RESURRECTING THE BAD TENDENCY TEST TO COMBAT INSTRUCTIONAL SPEECH: MILITIAS BEWARE

CASE COMMENT

Rice v. Paladin Enterprises, Inc., 128 F.3d 233 (4th Cir. 1997)

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In 1993, a hired killer committed a triple homicide using methods found in a book entitled Hit Man: A Technical Manual for Independent Contractors. *In a wrongful death action against the book's publisher, the Fourth Circuit held that the First Amendment did not protect the publisher from civil liability. This Comment contends that the Fourth Circuit, in effect, created a new class of unprotected speech in which liability attaches based upon the tendency of the words used. The author argues that the resurrection of this "bad tendency" test could adversely affect groups advocating unpopular views—most notably, militia groups. Recognizing the potential conflict with fundamental First Amendment values, the author proposes a different analytical framework that focuses on the expressive element of the speech and parallels the tests used to analyze symbolic and commercial speech. This approach, the author contends, will allow for greater protection of expressive speech than the Fourth Circuit's approach and is thus in greater harmony with the essential principles of the First Amendment.*

"Is the First Amendment a parasol or an umbrella?"[1]

I. INTRODUCTION

"Using your six-inch serrated blade knife, stab deeply into the side of the victim's neck and push the knife forward in a forceful movement. This method will half decapitate the victim, cutting both his main arteries and wind pipe, ensuring immediate death."[2]

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* I would like to thank Fred Block, Elizabeth Wewers, and Ann Griffith Millette for their insightful comments throughout the writing process. I would also like to extend my thanks to William Cowher and Richard Fliehr for their inspiration. Finally, I'd like to thank my parents, Bonnie and Dennis Molnar for providing me with the opportunity to write this paper. Everyone should be so lucky.

[1] This question was first posed, at least to the author's knowledge, by Professor Stanley K. Laughlin, Jr. of The Ohio State University College of Law. A parasol is a luxury on a sunny day, but when the rains come the parasol collapses. The harder the rain, the more useless a parasol is. Conversely, an umbrella is unnecessary when the skies are blue, but it is sure nice to have when the skies are awash with thunder and lightening.

[2] REX FERAL, HIT MAN: A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS 58 (1983) [hereinafter *Hit Man*]. The author of this book is actually a woman who has remained

This passage can be found within the pages of *Hit Man: A Technical Manual for Independent Contractors* (hereinafter "*Hit Man*"). *Hit Man* was recently linked to a grisly episode in which a killer, following *Hit Man*'s instructions, committed a triple murder. This Comment will evaluate a recent decision, arising from these murders, in which the Fourth Circuit held that the First Amendment does not bar imposition of liability on a publisher for actions taken by another with the "assistance" of *Hit Man*.[3] This Comment will argue that the Fourth Circuit, in effect, created a new class of unprotected speech, in which liability attaches based upon the *tendency* of the words used. The resurrection of what traditionally has been referred to as the "bad tendency" test[4] has several possible ramifications. Most prominently, if history teaches anything, resurrection of the "bad tendency" test can become almost a gag order for unpopular views expressed during times of "national emergency."[5] Presently, the groups most likely to be victimized for their unpopular views include militias. Therefore, the reinstitution of the "bad tendency" test may most significantly be used to strike at certain types of political speech associated with militia groups.

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unidentified. *See 60 Minutes* (CBS television broadcast, Mar. 2, 1997) (interviewing Peter Lund).

[3] The author is certainly not alone in expressing an opinion on the Fourth Circuit's decision. For opinions in support of the court's decision, see Bennett L. Gershman, *Perverting the First Amendment*, N.Y.L.J., Jan. 8, 1998, at 2; James J. Kilpatrick, Editorial, *The Killer Went by the Book, and the Book Went Too Far*, RALEIGH NEWS & OBSERVER, Dec. 20, 1997, at A21; Cathy Young, Opinion, *Free Speech Doesn't Cover Incitement-to-Murder Book*, DET. NEWS, Dec. 12, 1997, at A11; Bruce Fein, Commentary, *First Amendment Free Press Fiasco*, WASH. TIMES, Nov. 25, 1997, at A16; Gregory Kane, *'Hit Man' Shatters Free-Speech Limits*, DENV. POST, Nov. 24, 1997, at 11B; James S. Keat, Editorial, *Taking Exception to Critics of the 'Hit Man' Court Ruling*, BALT. SUN, Nov. 24, 1997, at 17A; DeWayne Wickham, *Freedom On Trial: Too Much or Too Little?*, USA TODAY, Nov. 18, 1997, at 15A; Stephen Barr, *Terror By Mail (Books and Products with Violent Intent)*, GOOD HOUSEKEEPING, Jan. 1, 1997, at 76. For the view that the Fourth Circuit's decision was erroneous, see Robyn Blumner, Editorial, *A Hit on Free Speech: All Publishers Could be Silenced by Ruling on Assassin's Guidebook*, ROCKY MTN. NEWS, Dec. 14, 1997, at 1B; Editorial, *Free Speech for Scoundrels*, SAN FRANCISCO EXAMINER, Nov. 30, 1997, at C14; Joseph Spear, *Censorship: Where Does it Stop?*, LAS VEGAS REV.-J., Nov. 21, 1997, at 15B; Ray Jenkins, *Court Ruling Deals Blow to Free Speech*, BALT. SUN, Nov. 17, 1997, at 13A; Editorial, *Free Speech Under Attack*, DENV. POST, Nov. 17, 1997, at 8B; Editorial, *Sleazy Speech, But Speech*, ROCKY MTN. NEWS, May 11, 1997, at 2B. The *Hit Man* murders were also the subject of a "60 Minutes" segment. *See 60 Minutes* (CBS television broadcast, Mar. 2, 1997).

[4] *See* Debs v. United States, 249 U.S. 211, 216 (1919); *infra* notes 24–38 and accompanying text.

[5] *See generally Debs*, 249 U.S. at 211. Debs was a socialist convicted of attempted obstruction of the draft based on a speech in which he denounced World War I. *See id.* at 212–13; *see also* David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1258–59 (1983) (observing that even within the context of a prewar tradition of "judicial hostility" towards free speech claims, Holmes "supported [even] greater restrictions on speech during times of war").

In Part II, this Comment will examine the relevant First Amendment law, with a special emphasis on the rationales and history behind the First Amendment's political speech doctrine. In Part III, this Comment will briefly summarize the current case, with an emphasis on the circuit court's analysis. In Part IV, this Comment argues that the Fourth Circuit was implicitly creating a new category of speech for instructional speech. Further, this Comment contends that the Fourth Circuit applied the "bad tendency" test to determine if *Hit Man*, and other instructional speech, should receive First Amendment protection. Finally, in Part V, this Comment will examine the future of instructional speech, arguing that within the context of the current "national emergency," the "bad tendency" test will likely be used as a tool to suppress militia speech, irrespective of its political value. This Comment will also argue that preexisting First Amendment doctrines more than adequately equip the judiciary with tools necessary to determine what types of instructional speech should be protected by the First Amendment.

II. RELEVANT FIRST AMENDMENT LAW

The First Amendment[6] offers protection from civil or criminal liability for speech, unless it falls within a narrowly limited class of unprotected speech.[7] Due to this Comment's emphasis on *Hit Man*, this section focuses on the narrowly limited class of words which incite imminent lawless action.[8] In defining this modern class of unprotected speech, it is helpful to understand the historical developments of the First Amendment, and the rationale behind its relevant doctrines. A brief explanation of these doctrines and historical developments follows.

A. *Rationale*

The defining metaphor of the First Amendment is Holmes's "marketplace of ideas" in which the "best test of truth is the power of the thought to get itself

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[6] "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

[7] These classes are: (1) fighting words, *see* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); (2) libel, *see* New York Times v. Sullivan, 376 U.S. 254, 267 (1964); (3) obscenity, *see* Miller v. California, 413 U.S. 15, 24 (1973); (4) commercial speech, *see* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); and (5) words likely to incite imminent lawless action, *see* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). For an excellent review of the First Amendment protections afforded various types of speech, see William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107 (1982).

[8] *See Brandenburg*, 395 U.S. at 447.

accepted in the competition of the market."[9] Holmes argued that the expression of ideas should only be suppressed when such ideas pose an imminent threat which necessitates an immediate check to preserve the country.[10] Holmes, along with Justice Brandeis, reaffirmed this conviction in *Gitlow v. New York*,[11] saying that "[i]f in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[12] Holmes's faith in the power of truth is a persuasive justification for freedom of speech.

Several other rationales have been offered to explain the value of First Amendment freedoms.[13] The "democracy" rationale asserts that democratic government is possible only when citizens are able to freely express their views on political issues.[14] The "self realization" rationale "justifies free speech by insisting that it is necessary for individual freedom and self-understanding."[15] Furthermore, an "autonomy" rationale values free speech because it facilitates the ability and responsibility of individuals to develop their rational capacities.[16]

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[9] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[10] *See id.* Holmes stated:

> I think we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Id.; *see also* G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CAL. L. REV. 391, 439–40 (1992) (finding Holmes's conception of truth to be the majoritarian prejudice at any point in time, while those who emphasized the social interest in speech see truth as informing and enlightening public opinion).

[11] 268 U.S. 652 (1924).

[12] *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting). *But see* Richard Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 7 (1986) ("If those beliefs are destined to prevail, free speech is irrelevant.").

[13] For a brief summary of contemporary First Amendment theory, see Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1617–27 (1987); David A. J. Richards, *A Theory of Free Speech*, 34 UCLA L. REV. 1837, 1881–89 (1987).

[14] *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis & Holmes, JJ., concurring) ("Freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . [and] should be a fundamental principle of the American government."); Steven D. Smith, Essay, *Radically Subversive Speech and the Authority of Law*, 94 MICH. L. REV. 348, 351 (1995) (describing democracy rationale).

[15] Smith, *supra* note 14, at 352 n.15.

[16] For an excellent discussion of autonomy and the First Amendment, see Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159 (1997).

Because these varying rationales may dictate different determinations of what speech should be protected under the First Amendment, they are important to understand.[17]

B. *Historical Developments*

1. *World War I and the Espionage Act*

The early twentieth century, as the United States became involved in World War I and the Communists seized control in Russia, saw the first significant cases challenging the extent of First Amendment protection.[18] In response to these events, Congress passed the Espionage Act[19] aimed at socialist sympathizers, particularly those obstructing the recruiting process.[20] In March 1919, the Court issued four Espionage Act opinions,[21] unanimously affirming convictions in all cases,[22] and thus maintaining pre-war judicial hostility towards the First Amendment.[23]

At the forefront of these four cases, at least historically, was *Schenck v. United States*.[24] The Court in *Schenck*, through Justice Holmes, stated that speech was protected[25] by the First Amendment unless it was of such a nature and used

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[17] *But see* Farber & Frickey, *supra* note 13, at 1640 (arguing that a better view of free speech is as part of "a web of mutually reinforcing values," i.e. self-realization, democracy, and autonomy, rather than as a tower of values in which there is one more basic value underlying free speech).

[18] *See* Lawrence F. Reger, *Montana's Criminal Syndicalism Statute: An Affront to the First Amendment*, 58 MONT. L. REV. 287, 290 (1997) ("Faced with anti-war movements and the Red Scare, legislators rushed to quash the advocacy efforts of dissident groups.").

[19] Espionage Act, ch. 30, tit. I, 40 Stat. 217 (1917) (codified as amended at 18 U.S.C. § 2388 (1976)).

[20] The organization called the Industrial Workers of the World (I.W.W.), a radical relative of the Socialist party, was a primary target, sparking numerous statutes suppressing dangerous speech associated with their anti-war activities. *See* Reger, *supra* note 18, at 290–91; *see also* Jason Talerman, Note, *The Death of Tupac: Gangsta Rap Killed the First Amendment*, 14 B.C. THIRD WORLD L.J. 117, 125 (1994) ("[T]he United States responded to the 1917 Communist overthrow of Tsarist Russia by unleashing a legal and social barrage against all those who expressed opinions in favor of a socialist regime.").

[21] Debs v. United States, 249 U.S. 211 (1919); Frowerk v. United States, 249 U.S. 204 (1919); Sugarman v. United States, 249 U.S. 182 (1919); Schenck v. United States, 249 U.S. 47 (1919).

[22] *See* Rabban, *supra* note 5, at 1244.

[23] *See id.* at 1265.

[24] 249 U.S. 47 (1919).

[25] Holmes established that not all speech was protected with his classic example of a man falsely shouting fire in a theater and causing panic. *See id.* at 52. Thus, the Court was forced to decide what speech fell outside of First Amendment protection.

in such circumstances as to "create a clear and present danger that [it] will bring about the substantive evils that Congress has a right to prevent."[26] While *Schenck* is considered by some to be the genesis of the clear and present danger test,[27] closer analysis reveals that Holmes was basing his decision on the "bad tendency" test.[28] Holmes argued that if actual obstruction of the recruiting service had occurred, then the speaker would be liable for the effect his words might produce.[29] Holmes concluded that "[i]f the [speech] act[,] . . . its *tendency* and the intent with which it was done are the same, we perceive no ground for saying that success alone warrants making the act a crime."[30] In applying the "bad tendency" test, Holmes *infers intent* from the "probable consequences and surrounding circumstances of speech."[31] This enabled Holmes to conclude that Schenck had the requisite criminal intent to be convicted of conspiracy to obstruct the draft.[32]

A week after *Schenck* was issued, the Court held that a Socialist's[33] speech advocating obstruction of the recruiting service was unprotected by the First Amendment.[34] The Court, again speaking through Justice Holmes, reiterated that a court can infer intent from the tendency of the words, stating that "if in that speech he [Debs] used words *tending to obstruct* the recruiting service he meant that they should have that effect."[35] Further, Holmes suggested that the encouragement present in Debs's speech need not be direct,[36] endorsing the lower court's jury instruction requiring Debs's conviction if he had a specific intent (inferred from the tendency of his speech) to use "words [that] had as their natural tendency and *reasonably probable effect* to obstruct the recruiting service."[37]

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[26] *Id.* at 52. Schenck circulated a pamphlet denouncing the constitutionality of conscription to men who had been called and accepted military service. *See id.* at 49. The pamphlet pronounced: "If you do not assert your rights [to oppose the draft], you are helping to deny or disparage rights which it is the solemn duty of all citizens . . . to retain." *Id.* at 51.

[27] *See* Reger, *supra* note 18, at 292.

[28] *See* Rabban, *supra* note 5, at 1259.

[29] *See Schenck*, 249 U.S. at 52.

[30] *Id.* (emphasis added). *See* Rabban, *supra* note 5, at 1261 (pointing out that the above quoted sentence is where "Holmes recurred to the 'bad tendency' doctrine").

[31] Rabban, *supra* note 5, at 1261.

[32] *See Schenck*, 249 U.S. at 52.

[33] The speaker was former presidential candidate Eugene V. Debs. Running for the fifth time as the Socialist candidate for President, Debs received over 900,000 votes in 1920. *See* Harry Kalven, Jr., *Ernst Freund and the First Amendment Tradition*, 40 U. CHI. L. REV. 235, 237 (1973).

[34] *See* Debs v. United States, 249 U.S. 211, 216 (1919).

[35] *Id.* (emphasis added).

[36] *See* Rabban, *supra* note 5, at 1264.

[37] *Debs*, 249 U.S. at 216. It is important to note the Court's sole consideration is the tendency of Debs's words to do harm—obstruction of the recruiting service. Nowhere in the opinion does the Court mention the value of this type of political discourse. The implication being that so long as speech tends to produce a harm, the government has an interest in

Thus, the "bad tendency" test, as articulated in *Schenck* and *Debs*, allowed a jury to infer intent, encouragement, and the attempted act through the natural tendency of that speaker's words.[38]

2. *McCarthyism and the Smith Act*

The next significant development in defining protected speech under the First Amendment arose in response to statutes aimed at quelling speech in response to the perceived "national emergencies" of the McCarthy era—the Cold War and communism.[39] The signature case of this period was *Dennis v. United States*.[40] In *Dennis*, the Smith Act[41] was first challenged as unconstitutionally infringing upon the First Amendment.[42] The defendants were indicted for (1) knowingly organizing the Communist Party,[43] a group known to advocate the violent overthrow of the Government of the United States, and (2) knowingly advocating and teaching the duty and necessity of overthrowing and destroying the

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preventing it, and thus, it can be proscribed irrespective of its value. *See infra* note 226.

[38] *See* Donald L. Beschle, *An Absolutism that Works: Reviving the Original "Clear and Present Danger" Test*, 1983 S. ILL. U. L.J. 127, 133 (arguing that *Schenck* and *Debs* make it clear that Holmes's concept of punishable speech is functionally the "bad tendency test"); Kalven, *supra* note 33, at 236 ("The start of the law of the first amendment is not *Schenck*; it is *Schenck* and *Debs* read together.").

[39] *See* Talerman, *supra* note 20, at 126 (concluding that the fight against communism in Korea, and the Senate hearings inspired by Senator Joseph McCarthy caused the First Amendment to undergo a regression in protection from which it did not fully rebound until the Vietnam War era).

[40] 341 U.S. 494 (1951).

[41] Smith Act, ch. 439, 54 Stat. 670 (1940) (codified as amended at 18 U.S.C. § 2385 (1994)). Among other things, the Smith Act made it illegal for any person "to knowingly or willfully advocate, abet, advise, or teach" the necessity of overthrowing the United States government by force. 18 U.S.C. § 2385 (1994).

[42] *See* Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 57 (1996) (reviewing the Court's avoidance of constitutional issues in deciding cases that arose under the Smith Act in the 1950s).

[43] *See* United States v. Dennis, 341 U.S. 494, 497 (1951). The Court noted that the court of appeals found the record to support the following conclusions:

> [T]he Communist Party is a highly disciplined organization, adept at infiltration into strategic positions, use of aliases, and double-meaning language; that the Party is rigidly controlled; that Communists, unlike other political parties, tolerate no dissension from the policy laid down by the guiding forces;... that the literature of the Party and the statements and activities of its leaders... advocate, and the general goal of the party was, during the period in question, to achieve a successful overthrow of the existing order by force and violence.

Government of the United States.[44] The majority stated that the test of First Amendment protection must be "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[45] In upholding these convictions, the Court apparently viewed world communism as such a grave danger as to make speech associated with its spread unprotected by the First Amendment.[46]

The doctrine adopted in *Dennis* was refined to protect more speech as McCarthyism died out, and the fervor of the Red Scare waned.[47] In *Yates v. United States*[48] the Court distinguished *Dennis*, holding that abstract advocacy was entitled to First Amendment protection, while more direct advocacy was not.[49] The Court later held that there must be a present advocacy of the violent overthrow of the government and not merely the possibility of future advocacy to obtain a conviction under the Smith Act.[50] The Court had weathered the McCarthyism scare, and was now returning to a more inclusive approach to the First Amendment.

C. *The Modern Law*

The modern restatement of the clear and present danger test[51] was articulated

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Id. at 498.

[44] *See id.* at 497.

[45] *Id.* at 510 (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)).

[46] *See* Kloppenberg, *supra* note 42, at 68 (arguing that the context of the "political atmosphere of 1951" was an important factor in the Court's perception of Communism).

[47] The Red Scare in this instance refers to the domestic concerns during the early 1950s about Communist infiltration into entertainment, business, and the military. *See* David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*, 29 GA. L. REV. 1, 11 (1994) ("The year was 1957, and although sentiment against Communism remained strong, the times had changed. The country had been made aware of the dangers of excess by such events as the censure of Senator McCarthy.").

[48] 354 U.S. 298 (1957).

[49] *See id.* at 308. The requirements of *Yates* were later found to apply to the Smith Act. *See* Scales v. United States, 367 U.S. 203, 221–22 (1961). Smith Act convictions could be sustained if there was teaching of forceful overthrow and a form of conduct: either (1) giving *directions* as to the type of illegal action which must be taken; or (2) undertaking legal action for the specific purpose of rendering effective the later illegal activity. *See id.* at 234.

[50] *See* Noto v. United States, 367 U.S. 290, 297–99 (1961) (finding mere abstract teaching of Communist theory is not the same as preparing a group for violent action, and steeling it to such action).

[51] *See* Beschle, *supra* note 38, at 145 (arguing that *Brandenburg* restores most of Holmes's position found within his articulation of the clear and present danger test, that "both specific intent and imminence with respect to a non-speech evil are required in order to punish speech").

by the Court in *Brandenburg v. Ohio*.[52] The *Brandenburg* Court held that advocating the use of force could not be proscribed unless such advocacy was directed at inciting imminent lawless action and was likely to do so.[53] Defendant[54] was convicted under an Ohio Criminal Syndicalism Act for pontificating that "if our [government] continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken."[55] The Court reasoned that the "'mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action . . . .' A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments."[56] The Court held the Ohio statute unconstitutional because it failed to make this critical distinction, and therefore punished not only the mere advocacy of action, but also assembly with others to merely advocate a certain action.[57]

The Court subsequently addressed the imminence requirement of *Brandenburg* in several cases,[58] including *Hess v. Indiana*.[59] The Court in *Hess* overturned defendant's disorderly conduct conviction because his speech did not come within the narrowly limited classes of speech which a state may punish.[60] The Court found Hess's words, "[w]e'll take the fucking street again," to amount

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[52] 395 U.S. 444 (1969).

[53] *See id.* at 447.

[54] One of twelve Ku Klux Klansmen gathered at a farm in Hamilton County, Ohio for a protest. *See id.* at 445.

[55] *Id.* at 446. Defendant went on to say that "[w]e are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi." *Id.*

[56] *Id.* at 448 (quoting Noto v. United States, 367 U.S. 290, 297–98 (1961)).

[57] *See Brandenburg*, 395 U.S. at 449. The Court observed that "[t]he Act punishes persons who 'advocate or teach the duty, necessity, or propriety' of violence 'as a means of accomplishing industrial or political reform'; or who publish or circulate or display any book or paper containing such advocacy[,] . . . " and concluded that the statute had failed to define the crimes in terms of "mere advocacy not distinguished from incitement to imminent lawless action." *Id.* at 448–49.

[58] *See* N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 915 (1982) (holding the words "if we catch any of you going in any of them damn racist stores, we're gonna break your damn neck" to be protected under *Brandenburg* because the violent acts that followed the speech occurred weeks or months thereafter); Watts v. United States, 394 U.S. 705, 706 (1969) (holding the words "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." to be nothing more than crudely stating his opposition to the President, and thus protected under the First Amendment).

[59] 414 U.S. 105 (1973).

[60] *See Hess*, 414 U.S. at 106–09. Hess was involved in an antiwar demonstration that was in the process of being dispersed by police, at which point Hess said to the sheriff, "We'll take the fucking street again." *Id.* at 106–07.

to no more than advocacy of illegal action at some indefinite future time.[61] The Court further required proof that Hess's "words were *intended* to produce . . . imminent disorder."[62] Without such proof, the Court found Hess's words protected by the First Amendment.

The Court has yet to address the "incitement" and "lawless" action prongs subsequent to *Brandenburg*. Incitement, however, has previously been defined as urging a person to do something rather than to merely believe something.[63] Lawlessness, conversely, is a bit more difficult to define. The Court in this prong of *Brandenburg* departed from the *Dennis* language.[64] At least one commentator perceives lawlessness to embody a requirement of serious harm.[65] However, in reaching this conclusion, one must look at the Court's determination of harm in cases prior to *Brandenburg*.[66] This would involve a comparison of harm requirements that are at least semantically different.[67] Therefore, the definition of lawlessness can probably best be described as unsettled.

As this Comment describes the actual case involving *Hit Man*, it is important to keep in mind the rationales underlying the First Amendment's treatment of political speech, and the emergence of the modern political speech doctrine. This Comment will now turn to the case of *Paladin v. Rice*.[68]

III. THE CASE OF *PALADIN V. RICE*

An understanding of the ramifications and ultimate niche that this decision may occupy within First Amendment jurisprudence is strongly dependent on familiarization with the facts presented in the case, and the reasoning used by the district and circuit courts to reach their opposite conclusions. Both the facts and

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[61] *See id.* at 107: "Hess's statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action." *Id.* at 108–09.

[62] *Id.* at 109 (emphasis added).

[63] *See* Yates v. United States, 354 U.S. 298, 324–25 (1957).

[64] Lawlessness may simply mean breaking the law, whereas *Dennis* requires serious harm. *See supra* note 45 and accompanying text. Thus, under *Brandenburg*, a speaker may be punished for advocating jaywalking if such a result is imminent and likely. This result would be improbable under *Dennis*, for the harm is not great enough.

[65] *See* Russell W. Galloway, *Basic Free Speech Analysis*, 31 SANTA CLARA L. REV. 883, 968–69 (1991) ("[R]espondent must prove that the harm threatened was serious. Inciting someone to walk on the grass in violation of a 'Stay off the Grass' sign would presumably not suffice.").

[66] *See id.* (finding *Brandenburg* to require serious harm (citing Dennis v. United States, 341 U.S. 494 (1951); Bridges v. California, 314 U.S. 252 (1942); Whitney v. California, 274 U.S. 357 (1927))).

[67] *Brandenburg* assessed harm in terms of lawlessness, while *Dennis* assessed harm by looking at the gravity of such harm discounted by its probability. *See supra* note 45 and accompanying text.

[68] 128 F.3d 233 (4th Cir. 1997).

the reasoning used by the two courts are discussed below.

A. *Facts and Stipulations*

On the night of March 3, 1993, in Silver Springs, Maryland, James Perry savagely murdered Mildred Horn and Janice Saunders by shooting them through the eyes and strangled Ms. Horn's eight-year-old quadriplegic son, Trevor.[69] This gruesome story takes on a sickening twist when one learns that Mr. Perry was not acting out of vengeance, but was instead hired by Lawrence Horn, Ms. Horn's ex-husband and Trevor's father, to commit this brutal crime.[70] Even more appalling is the fact that Mr. Horn's greed was the driving force behind this crime—he would receive the $2 million his son received in a settlement for injuries that rendered him a permanent quadriplegic.[71] In some measure of justice for the surviving family members of the deceased, Mr. Perry and Mr. Horn have both been convicted and sentenced accordingly.[72] However, these convictions are not the end of the story; for the purposes of the First Amendment, they are just the beginning.

It appears that James Perry was not acting without assistance—a copy of *Hit Man*[73] was found in his apartment after the murders.[74] Published by Paladin

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[69] *See Rice*, 128 F.3d at 239.

[70] *See id.*

[71] *See id.*

[72] James Perry was convicted of first degree murder and sentenced to death. Lawrence Horn was convicted of first degree murder and is serving a life sentence without the possibility of parole. *See* Adam Cohen, *Murder by the Book*, TIME, Dec. 1, 1997, at 74; Kilpatrick, *supra* note 3, at A21.

[73] *Hit Man* is not a book easily found on the shelves of one's local library. The author of this Comment had to order the book from Paladin Press, and, quite naturally, it is not expected that the readers of this Comment will do the same. Therefore this Comment will generally cite to the parts of *Hit Man* reported in the district and circuit court opinions, while occasionally citing to very specific parts of the text not found in these opinions. However, if there is an interest in obtaining a copy of *Hit Man*, then it can be ordered via credit card over the Internet from Paladin's web site at < http://www.paladin-press.com >. Irrespective of one's wishes to purchase *Hit Man*, this website still provides a fascinating array of titles, along with links to similar websites, that provide insight into the type of speech addressed by this Comment.

[74] *See id.* Perry had purchased the book from a mail order catalogue distributed by Paladin. Within this catalogue, Paladin described *Hit Man* in the following way:

> Rex Feral kills for hire. Some consider him a criminal. Others think him a hero. In truth, he is a lethal weapon aimed at those he hunts. He is a last recourse in these times when laws are so twisted that justice goes unserved. He is a man who feels no twinge of guilt at doing his job. *He is a professional killer.*
>
> Learn how a pro gets assignments, creates a false identity, makes a disposable silencer, leaves the scene without a trace, watches his mark unobserved and more. Feral reveals how to get in, do the job and get out without getting caught. *For academic study*

Press, *Hit Man* teaches the reader how to solicit business, choose a weapon, make a silencer, perform the kill, dispose of the weapon, and much more—all in explicit detail.[75] Perry meticulously followed over twenty of *Hit Man*'s instructions[76] on his way to becoming a killer for hire. Based on these facts, plaintiffs brought a wrongful death action against Paladin,[77] asserting that *Hit Man* aided and abetted[78] Perry in his commission of the grisly triple homicide.

For the purpose of the appeal before the Fourth Circuit, both parties stipulated to a joint statement of facts.[79] Paladin conceded for the purposes of the appeal[80] that Perry followed a number of *Hit Man*'s instructions in "planning, executing and attempting to get away with" the murders on the night of March 3, 1993.[81] Paladin further stipulated that they marketed *Hit Man* with an intent to attract and assist criminals, and that they "intended and had knowledge that their publications

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only.

Rice v. Paladin Enterprises, Inc., 940 F. Supp. 836, 838 (D. Md. 1996). Also found in Perry's apartment was another Paladin book, *How to Make a Disposable Silencer, Vol. II. See id.* As *Hit Man* contains a chapter on how to make silencers, the author will only discuss that book for the purpose of this Comment.

[75] *See Rice*, 128 F.3d at 235–39 (quoting *Hit Man*). The following passage is representative of the brutal detail contained within *Hit Man*'s pages describing what weapon to use: "An ice pick can . . . be driven into the victim's brain, through the ear, after he has been subdued. The wound hardly bleeds at all, and death is sometimes attributed to natural causes." *Id.* at 237. In instructing the reader on how to kill, *Hit Man* teaches: "When using a small caliber weapon like the 22, it is best to shoot from a distance of three to six feet. You will not want to be at pointblank range to avoid having the victim's blood splatter on you or your clothing." *Id.* To dispose of the corpse, *Hit Man* instructs the reader to "cut off the head . . . and blow the telltale dentition to smithereens! After this, authorities can't use the victim's dental records to identify his remains." *Id.* at 238.

[76] *See id.* at 239. Perry solicited a client through a friend, received his expense money up front, killed the "mark" at home, used a rental car, placed stolen out-of-state license tags on that car, used an AR-7 rifle with the serial numbers drilled out, killed the marks from between three and six feet with several shots through the eyes, and disposed of the weapon by disassembling it, and then scattering it throughout the countryside. *See id.* at 239–41. These are all specific instructions found within the pages of *Hit Man*. *See id.* at 239–41. Additionally, *Hit Man* specifically taught Perry how to build a silencer and make ballistic alterations to the AR-7 rifle. *See id.* at 240.

[77] *See id.* at 241.

[78] To be liable for aiding and abetting in Maryland, (1) the principal must perform a wrongful act, (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time he provides assistance, and (3) the defendant must knowingly and substantially aid the principal. *See* Rice v. Paladin Enterprises, Inc., 940 F. Supp. 836, 841–42 (D. Md. 1996).

[79] *See Rice*, 128 F.3d at 241 n.2 (citing Joint Statement of Facts [hereinafter J.S.]).

[80] The parties specifically reserved the right to contest any stipulation contained in the J.S. at any subsequent hearing. *Id.*

[81] *Id.* (citing J.S. ¶ 6).

would be used . . . by criminals . . . to plan and execute the crime of murder for hire, in the manner set forth in the publication."[82] Paladin has even stipulated that by publishing and distributing *Hit Man*, they "assisted [Perry] in the subsequent perpetration of the murders which are the subject of this litigation . . . ."[83] Plaintiffs also stipulated for this appeal that Paladin's marketing strategy intended to maximize sales, including sales for legitimate purposes to a number of audiences.[84] Finally, plaintiffs stipulated that James Perry committed these murders a year after receiving *Hit Man*.[85]

B. *The Parties' Arguments*

The sole issue decided by the court was whether the First Amendment, as a matter of law, is a complete defense to the wrongful death action set forth by the plaintiff.[86]

1. *Rice's Position*

Plaintiffs' contention at trial was that the speech contained within *Hit Man* was not protected by the First Amendment, and in fact, aided and abetted James Perry in killing Ms. Horn, her son, and Ms. Saunders.[87] Plaintiff's argument was simply that the First Amendment does not protect communication aiding and abetting murder.[88] Underlying this position is the principle that speech, which in its effect is tantamount to "legitimately proscribable nonexpressive conduct,"[89] is itself legitimately proscribable if it is incidental to laws of general applicability.[90] In other words, plaintiffs argued that *Hit Man* did not constitute speech, but rather illegal conduct.

Alternatively, assuming *Hit Man* was deemed speech by the court, plaintiff

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[82] *Id.* (citing J.S. ¶ 4(b)).

[83] *Id.* (citing J.S. ¶ 7).

[84] *See id.* (citing J.S. ¶ 5(a)). Plaintiffs conceded for the purposes of appeal that as well as being sold to the general public, Paladin marketed *Hit Man* toward several audiences including: authors desiring information for the purposes of writing books about crime or criminals, law enforcement officers and criminologists for the purpose of dissecting criminal methodology, persons who fantasize about committing crimes but do not act on these desires, and persons who enjoy this type of reading for entertainment purposes. *See id.*

[85] *See* Rice v. Paladin Enterprises, Inc., 940 F. Supp. 836, 847 (D. Md. 1996) (citing J.S. ¶¶ 2 and 6).

[86] *See* Rice v. Paladin Enterprises, Inc., 128 F.3d 233, 241 (4th Cir. 1997).

[87] *See supra* note 78.

[88] *See Rice*, 940 F. Supp. at 842.

[89] *Rice*, 128 F.3d at 243.

[90] *See* Cohen v. Cowles Media Co., 501 U.S. 663, 670 (1991) (holding that the publisher of a newspaper has no special immunity from the application of general laws).

argued that the standard articulated in *Brandenburg v. Ohio*[91] does not apply to the speech in question.[92] Plaintiff argued that the *Brandenburg* standard only applies to speech on issues of social and political importance, and that the speech in *Hit Man* was neither.[93] The appropriate standard, plaintiffs argued, is established by analogy to *New York Times v. Sullivan*.[94] This standard would not protect speech if a speaker acts with a knowing and reckless disregard for human life.[95]

2. *Paladin's Position*

Paladin's position was quite simply that the First Amendment protects the speech contained within *Hit Man*, and thus acts as a bar to any civil liability.[96] Paladin argued that the First Amendment interests at stake in the case were to be evaluated under *Brandenburg*.[97] Thus, unless Paladin, by publishing *Hit Man*, intended to produce imminent lawless action and was likely to produce such action, the speech contained therein was protected under the First Amendment.[98] Paladin concluded that unless they intended, through publication of *Hit Man*, for James Perry to immediately go out and commit a triple murder, they were entitled to First Amendment protection, which includes a bar to all civil and criminal liability.[99]

C. *The Rulings*

1. *The District Court*

The district court's decision rested primarily on the application of *Brandenburg* to the speech contained within *Hit Man*.[100] The court interpreted

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[91] *See supra* note 53 and accompanying text.

[92] *See Rice*, 940 F. Supp. at 841.

[93] *See id.* at 845.

[94] 376 U.S. 254, 283–88 (1964) (holding that a public official, in order to recover in a libel action, must show actual malice, or that a statement was made with reckless disregard of whether it was true or false). Plaintiffs sought to analogize damage of an individual's reputation caused by the reckless disregard of a publisher, to physical damage done to an individual caused by the same reckless disregard. *See Rice*, 940 F. Supp. at 843–44. The district court gave this argument no credence, saying that *New York Times* "has no bearing on the facts of this case." *Id.* at 844.

[95] *See Rice*, 940 F. Supp. at 844.

[96] *See* Rice v. Paladin, 128 F.3d 233, 241 (4th Cir. 1997).

[97] *See id.* at 256.

[98] *See supra* note 53 and accompanying text.

[99] *See Rice*, 128 F.3d at 242 (citing J.S. ¶ 4(c)).

[100] *See Rice*, 940 F. Supp. at 845. The court did erroneously conclude that Maryland law

Brandenburg to distinguish between speech "which merely advocates law violation and speech which incites imminent lawless activity."[101] The court thus determined the question in this case to be whether "*Hit Man* merely advocates or teaches murder or whether it incites or encourages murder."[102] The court concluded that Paladin, under the *Brandenburg* test, must have intended that Perry would commit the triple murder immediately.[103] The court found these particular facts to lack the requisite intent,[104] a "call to action,"[105] and immediacy;[106] and thus, concluded that Paladin and *Hit Man* were entitled to First Amendment protection.[107]

2. *The Court of Appeals for the Fourth Circuit*

The Fourth Circuit reversed the decision of the district court's granting of summary judgment to Paladin, and remanded for trial.[108] The court first established that "abstract advocacy of lawlessness is protected speech under the First Amendment."[109] However, the court, by quoting Justice Black,[110] noted that

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did not recognize the tort of aiding and abetting. *See id.* at 842. However, this misinterpretation does not affect the First Amendment analysis with which this Comment is concerned.

[101] *Id.* at 845.

[102] *Id.* at 845 (citing Brandenburg v. Ohio, 395 U.S. 444, 449 (1969)).

[103] *See id.* at 847.

[104] The court found that Paladin intended their books to be "purchased and actually used by criminals," but that Paladin did not intend for James Perry to go out and commit a triple murder immediately. *Id.*

[105] The court noted that "[n]othing in the book says 'go out and commit murder now!' Instead, the book seems to say, in so many words, 'if you want to be a hit man this is what you need to do.' This is advocacy not incitement." *Id.*

[106] The court emphasizes the context of the advocacy, saying that because *books* take time to read, *Hit Man* "at worst ... amount[s] to nothing more than advocacy of illegal action at some indefinite future time." *Id.* at 848. Thus, it is not surprising that James Perry committed his crimes a year after purchasing *Hit Man*.

[107] *See id.*

[108] *See* Rice v. Paladin Enterprises, Inc., 128 F.3d 233, 267 (4th Cir. 1997).

[109] *Rice*, 128 F.3d at 243 (citing Brandenburg v. Ohio, 395 U.S. 444 (1969)).

[110] Justice Black was a renowned supporter of the First Amendment. He stated:

> The First Amendment is truly the heart of the Bill of Rights. The Framers balanced its freedoms of religion, speech, press, assembly and petition against the needs of a powerful central government, and decided that in those freedoms lies this nation's only true security. They were not afraid for men to be free. We should not be.

Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 881 (1960); *see also* Harry Kalven, Jr., *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428, 432 (1967) (summarizing Black's basic First Amendment philosophy as "[f]reedom of speech is indivisible; unless we protect it for all, we will have it for none .... The choice for freedom of

"it has never been deemed an abridgment of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part . . . carried out by means of [speech]."[111] If the First Amendment were to protect such "speech brigaded by action,"[112] the government would have no means to "protect the public from . . . even the most pernicious . . . civil wrongs."[113] The court concluded that the "speech-act doctrine has long been invoked to sustain convictions for aiding and abetting the commission of criminal offenses . . . [and] that the First Amendment does not necessarily pose a bar to liability [when using speech] for aiding and abetting a crime."[114]

The first issue addressed by the circuit court was whether or not *Hit Man* is best described as advocacy of illegal action or part of the "speech-act" doctrine. In addressing this issue, the court necessarily understood *Brandenburg* to apply to only critical, abstract discussion of existing laws, and not "speech which urges the listeners to commit violations of current law."[115] The court reasoned that even if "preparation and steeling is not *per se* unprotected," it may only be protected within the context of "*advocacy*—speech that is part and parcel of political and social discourse."[116] Thus, according to the court, one can prepare and steel "another to violent action not only through the dissident 'call to violence,' but also through speech, *such as instruction* . . . that does not . . . remotely resemble advocacy."[117] The court finally concluded that *Hit Man* contained speech that

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speech is a choice made once and for all by the Founding Fathers and is not subject to reassessment in light of current anxieties."); Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 695–97 (1963) (observing that the Court's decisions in the early 1950s, and their balancing of social interests, pushed Black further and further, until he finally took an "absolute" view of the First Amendment);.

[111] *Rice*, 128 F.3d at 243 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (holding that picketing was an inseparable part of a single integrated and illegal course of conduct and could thus be enjoined)). *But see* Reich, *supra* note 110, at 687, 717 (stating that Black's decision in *Giboney* came during a period when he basically attempted to accommodate conflicting community interests; however, it was not until 1960 that Black had firmly adopted the absolutist principle into his philosophy).

[112] *Rice*, 128 F.3d at 244 (quoting Brandenburg v. Ohio, 395 U.S. 444, 456 (1969) (Douglas, J., concurring)). "Speech acts" exist where the speech is an integral part of criminal conduct. *See id.* at 247 n.3 (citing Department of Justice, *Report on the Availability of Bombmaking Information, the Extent to Which Its Dissemination is Controlled by Federal Law, and the Extent to Which Such Dissemination May Be Subject to Regulation Consistent with the First Amendment to the United States Constitution* (visited April 1997) <http://www.jya.com/abi.htm> [hereinafter DOJ REPORT]. Such "speech acts" may be regulated without First Amendment concerns because it is "merely incidental that such 'conduct' takes the form of speech." *Id.*

[113] *Rice*, 128 F.3d at 244.

[114] *Id.*

[115] *Id.* at 246.

[116] *Id.* at 264.

[117] *Id.* at 265 (emphasis added).

could be considered advocacy.[118]

The Fourth Circuit further determined that *Hit Man* did indeed constitute a "speech act," thus eliminating the First Amendment as a necessary bar to imputation of civil liability.[119] In coming to this conclusion, the court relied on a Ninth Circuit decision holding that the First Amendment is not a bar to criminal aiding and abetting charges which arise from publication and distribution of instructions on how to make illegal drugs.[120] The court further relied on a series of circuit court cases holding that the First Amendment is "generally inapplicable to charges of aiding and abetting violations of the tax laws"[121] to support its conclusion that *Hit Man* falls into the speech-act doctrine, and is thus not entitled to an absolute First Amendment defense.

The court then addressed the extent to which the First Amendment exerts influence upon the speech-act doctrine. The court concluded that, depending on the context, the First Amendment may "superimpose . . . a heightened intent requirement [upon the speech-act doctrine] in order [to preserve the] preeminent values underlying [freedom of speech.]"[122] These values are primarily concerned with the "chilling of entirely innocent, lawfully useful speech [through the] imposition of liability on the basis of mere foreseeability or knowledge that the information one imparts could be misused for an impermissible purpose."[123] The court concluded that although a heightened intent may be needed in some instances, there was no need to determine the scope of an intent-based limitation because Paladin had stipulated to an intent that "would satisfy any heightened standard that might be required by the First Amendment . . . [before] imposition of liability for aiding and abetting through speech conduct."[124]

The circuit court then analyzed the facts of the case within the their First Amendment framework, and concluded that even absent Paladin's express stipulations, a reasonable jury could still find that Paladin aided and abetted James

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118 *See id.*

119 *See id.* at 267.

120 *See* United States v. Barnett, 667 F.2d 835, 843 (9th Cir. 1995). "The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose." *Id.* at 842.

121 *Rice*, 128 F.3d at 245–46; *see also* United States v. Mendelsohn, 896 F.2d 1183, 1185 (9th Cir. 1990) (holding that the sale of a computer program which aided illegal gambling was not entitled to First Amendment protection unless the "speech was informational in a manner removed from immediate connection to the commission of a specific criminal act"); United States v. Freeman, 761 F.2d 549, 551 (9th Cir. 1985), *cert. denied*, 476 U.S. 1120 (1986) ("[T]here will be some instances where speech is so close in time and substance to the ultimate criminal conduct that no free speech defense is appropriate."); United States v. Kelley, 769 F.2d 215, 217 (4th Cir. 1985) ("[T]he First Amendment . . . lends no protection to speech which urges the listeners to commit violations of current law.").

122 *Rice*, 128 F.3d at 247.

123 *Id.*

124 *Id* at 248.

Perry.[125] The court found that the "number and extent of these parallels [between the actual murders and] the instructions in *Hit Man* cannot be consigned . . . to mere coincidence . . . [and thus] creates a jury issue as to whether the book provided substantial assistance."[126] The court also found that *Hit Man* encouraged[127] Perry's acts, emboldening the killer by challenging his manhood at every point where the potential murderer is confronted by reason or humanity.[128] The court finally held that, even absent any stipulations by Paladin, a jury could reasonably find that Paladin acted with the heightened intent which the First Amendment may impose on this fact situation.[129] Thus, the court not only concluded that the First Amendment does not bar plaintiff's action, but that the facts themselves are capable of supporting a finding that Paladin aided and abetted Perry in the murder of Mildred Horn, Trevor Horn, and Janice Saunders.

IV. ANALYSIS OF THE FOURTH CIRCUIT'S DECISION

This analysis will focus on the Fourth Circuit's conclusions about *Hit Man*, wholly separate from Paladin's stipulations.[130] This analysis will primarily examine the court's conclusion that a reasonable jury could find Paladin to have the requisite intent to support civil liability under any heightened First Amendment standard.[131] This Comment will also touch on the court's conclusion that *Hit Man* did in fact "prepare and steel" James Perry to action.[132]

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[125] *See id.* at 252.

[126] *Id.*; *see also id.* at 264 (suggesting that the instructional manual must "prepare" another for the commission of a criminal act, if such speech is to fall outside of *Brandenburg* scrutiny); *supra* note 78 (a defendant must substantially aid the principal).

[127] *See id.* at 264 (suggesting that the instructional manual must "steel" another to action to fall outside the application of *Brandenburg*).

[128] *See id.* at 252. The court reasons that through "powerful prose in the second person and imperative voice, it encourages its readers in their specific acts of murder." The court further concludes that "[t]he book is so effectively written that its protagonist seems actually to be present [through the entirety] of the murders the book inspires."

[129] *See id.* The court found four bases under which a reasonable jury could find that Paladin possessed the requisite intent under Maryland law: (1) The declared purpose of the book is to aid murder; (2) *Hit Man*'s extensive promotion of murder is highly probative of Paladin's intent; (3) Paladin's marketing strategy based on an inference from Paladin's catalogue advertisement; and (4) *Hit Man*'s only genuine use is the unlawful aim of facilitating murders. *See id.* at 252–55; *infra* notes 183–96 and accompanying text.

[130] *See supra* notes 79–85 and accompanying text. One could argue that Paladin effectively stipulated away their First Amendment defense, but this facet of the case is beyond the scope of this Comment.

[131] *See Rice*, 128 F.3d at 253.

[132] *See id.* at 252.

A. *Creating a New Category of Speech*

The Supreme Court has recognized several well-defined and narrowly tailored classes of speech which receive little or no protection from the First Amendment.[133] Additionally, the First Amendment has been understood to afford little protection to speech which amounts to conduct because prohibiting such conduct is thought to have only incidental effects on the freedom of speech.[134] Thus, in order to find that Paladin was not entitled to summary judgment, the Fourth Circuit needed to fit *Hit Man* into one of these classes of unprotected speech, or deem it conduct.[135] The court opted for the latter, saying *Hit Man* fell into the speech-act doctrine.[136] However, this Comment contends that the court's decision was predominantly motivated by certain factors indicating the creation of a new class of unprotected speech rather than *Hit Man*'s purported status as a "speech act." To support this assertion, this Comment will examine the Fourth Circuit's analysis related to the speech-act doctrine, *Brandenburg*, the value of *Hit Man*, and the societal harm created by *Hit Man*.

1. *The Speech-Act Doctrine Analysis*

There is no question that the speech-act doctrine motivated the court, but not to the extent represented by the Fourth Circuit opinion. As previously discussed, the court relied on several circuit court opinions which held that instructional speech that aided and abetted criminal acts was not necessarily entitled to First Amendment protection.[137] The court cited *United States v. Barnett*[138] for the general proposition that the First Amendment does not provide a defense to a criminal charge simply because the actor used words to carry out his illegal

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[133] *See supra* note 7.

[134] *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) ("[A] sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms.").

[135] Presumably the Court will first ask if the activity is speech or conduct, and then determine, if necessary, whether the speech is protected or not. *See* Galloway, *supra* note 65, at 891–94 ("The first threshold question is whether the case implicates a communicative interest" and then if the communications in question fall outside of First Amendment protections.); *see also* Beschle, *supra* note 38, at 130 ("Asking whether activity is speech or conduct rather than whether 'speech' is protected or unprotected merely changes the vocabulary used in close cases without making the outcome any more certain."); Laurence J. Einstein & Steven Semararo, *Abortion Clinic Protest and the First Amendment*, 13 ST. LOUIS U. PUB. L. REV. 221, 233 (1993) ("Distinctions between . . . protected and unprotected [speech], which many courts and scholars have recognized, cannot easily turn on whether something is 'speech' or 'conduct.'").

[136] *See* discussion, *supra* Part III.C.2.

[137] *See supra* notes 120–21 and accompanying text.

[138] 667 F.2d 835 (9th Cir. 1982).

purpose.[139] However, the court in *Barnett* did not need, nor did it attempt, to determine when pure speech becomes part of the criminal act.[140] The Ninth Circuit did answer this question in *United States v. Freeman*,[141] another decision relied upon by the Fourth Circuit.[142] *Freeman* held that for First Amendment protection to evaporate, "the intent of the actor and the objective meaning of the words [must be] used [in a manner] *so close in time* and purpose to a substantive evil as to become part of the ultimate crime itself."[143] The *Freeman* court held that the defendant was entitled to a *Brandenburg* instruction[144] for twelve of the fourteen criminal counts.[145] But for the two counts in which the defendant actually prepared a draft of a tax return for false filing purposes, the court concluded that the criminal act was so proximately tied to the speech that no First Amendment defense existed.[146]

The Fourth Circuit correctly relies on *Barnett* for its articulation of the general principles defining the relationship between the First Amendment and criminal acts. However, the Fourth Circuit ignores the "proximity" requirement articulated by the Ninth Circuit, saying that "[t]he principle of *Barnett* [is] that the provision of instructions that aid and abet another in the commission of a criminal offense is unprotected by the First Amendment . . . ."[147] This interpretation allows the Fourth Circuit to classify *Hit Man* as aiding and abetting, even though its publication occurred ten years before the Perry murders,[148] and Perry was in possession of *Hit Man* for a year before he committed murder.[149] Indeed, *Hit Man* did not verify Perry's "plan," buy his gun, or do anything that "solicit[ed] or counsel[ed] violation of the law in an immediate sense."[150] Thus, although the court does consider *Hit Man* a speech-act in the form of aiding and abetting, this conclusion is based on a tenuous application of the facts to a questionable interpretation of the law, and may not even be supported by a case upon which

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[139] *See id.* at 842.

[140] The court was concerned with the existence of probable cause to support a search rather than the defenses defendant may have used at trial. *See id.* at 843. The court did note that the First Amendment did not provide a defense in this case, but did not define at what point the First Amendment fails to provide a defense for the printed word. *See id.*

[141] 761 F.2d 549 (9th Cir. 1985), *cert. denied*, 476 U.S. 1120 (1986).

[142] *See* Rice v. Paladin Enterprises, Inc., 128 F.3d 233, 245 (4th Cir. 1997).

[143] *Freeman*, 761 F.2d at 552 (citing *Barnett*, 667 F.2d at 842–43) (emphasis added).

[144] The defendant's speech is protected "unless both the intent of the speaker *and* the tendency of his words was to produce or incite an imminent lawless act . . . ." *Id.* at 552 (emphasis added).

[145] *See id.*

[146] *See id.*

[147] Rice v. Paladin, 128 F.3d 233, 245 (4th Cir. 1997).

[148] *Hit Man* was published in 1983, and Perry committed the murders in 1993.

[149] *See supra* note 106 and accompanying text.

[150] *Freeman*, 761 F.2d at 551–52.

the court relies.[151]

2. *The Non-application of* Brandenburg

A better understanding of the court's decision can be gleaned from their interpretation of *Brandenburg*, and how they felt it did not apply to this case.[152] As already discussed, the Fourth Circuit understood the *Brandenburg* protections of "imminence" and "incitement" to apply only to "mere abstract teaching" and not teaching itself, or as the Fourth Circuit describes it, preparing and steeling.[153] The court concluded that speech, absent advocacy, which prepares and steels another to action[154] receives less or no protection from the First Amendment.[155]

The fact that the court determined that *Hit Man* was not entitled to an application of *Brandenburg*'s protective test is consistent with the court's conclusion that Paladin aided and abetted James Perry. The thorough discussion and analysis of *Brandenburg*, however, is revealing of the court's true motives because it indicates that they believed *Hit Man* to be speech. If this was conduct, or a "speech act," a discussion of the applicability of *Brandenburg* would be unnecessary, as nonexpressive and expressive conduct are governed by a different line of cases.[156] Rather, the court understood that if *Hit Man* is considered speech, then the court needed to pigeonhole it into an area of unprotected speech. The court could not fit *Hit Man* into the *Brandenburg* category because its imminence requirement, arguably the same criteria found in *Freeman v. United States*,[157] would necessitate the conclusion that *Hit Man* was protected speech.[158]

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[151] A possible explanation for the court's choice of analysis is their perception of *Hit Man* as utterly without value, and morally culpable for the murders at issue. *See* Beschle, *supra* note 38, at 134 ("If the primary focus is placed upon . . . [the moral blameworthiness of the actor], then it seems logical to require only sufficient action on part of the defendant to corroborate his intent, and to indicate that it is more than a passing whim.").

[152] *See Rice*, 128 F.3d at 263–65; *see also* discussion *supra* Part III.C.2.

[153] *See Rice*, 128 F.3d at 263–64; *see also supra* notes 115–18 and accompanying text.

[154] The court referred to "instruction in the methods of terror or other crimes." *Rice*, 128 F.3d at 265.

[155] *See id.*

[156] The first determination is whether the law proscribes conduct or communication, and then whether it is protected speech. *See supra* note 135. If it were deemed conduct, the proper analysis would be to determine if attaching liability to such words furthers a state interest unrelated to the suppression of speech in a manner which is minimally restrictive upon First Amendment freedoms. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968).

[157] 761 F.2d 549 (9th Cir. 1985); *see supra* note 121.

[158] *See* Avital T. Zer-Ilan, Case Note, *The First Amendment and Murder Manuals,* Rice v. Paladin Enterprises, Inc., *940 F. Supp. 836 (D. Md. 1996)*., 106 YALE L.J. 2697, 2700 (1997) (arguing that "the *Rice* court was correct in holding that, under the *Brandenburg* test, Paladin could not be held liable"). *But see* Theresa J. Pulley Radwan, *How Imminent is Imminent?: The Imminent Danger Test Applied to Murder Manuals*, 8 SETON HALL CONST. L.J. 47, 73 (1997)

Therefore, the Fourth Circuit informally created another class of unprotected speech out of necessity, which allowed them, in good conscience, to permit the civil case against Paladin to proceed.

3. Hit Man's *Value and Societal Harm*

Relying upon valuelessness and grave societal harm indicates that a court may be informally creating a class of less protected speech. The Supreme Court has not expressly stated what speech characteristics may give rise to a new category of unprotected speech, but the Court, when creating categories of lesser protected speech,[159] generally refers to the speech's lack of value and societal harm as important attributes.[160] The Court may also engage in a balancing method, weighing the value of the speech against the interest in preventing the harm associated with such speech, and making the appropriate determination.[161]

a. *Valuelessness*

In determining that *Hit Man* fell into a "new" class of speech and did not merit First Amendment protection, the court emphasized two attributes of *Hit*

("Given the detail provided in these manuals, it is not entirely clear that they do not incite immediate lawless action."); Andrew B. Sims, *Tort Liability for Physical Injuries Allegedly from Media Speech: A Comprehensive First Amendment Approach*, 34 ARIZ. L. REV. 231, 261 (1992) (suggesting that a court may loosely interpret the "imminency requirement" where the harm is grave enough, e.g., "solicitation of criminal action at a future . . . date would be deemed 'imminent' notwithstanding the time lapse from the solicitation").

[159] Or in a different parlance—what level of protection the speech shall receive?

[160] *See* New York v. Ferber, 458 U.S. 747, 759–64 (1982) (finding child pornography to cause an extensive *harm* and to be of *de minimis value*, and thus concluding that child pornography was without First Amendment protection); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) ("[s]uch utterances are no essential part of any exposition of ideas, and are of such slight social *value* as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality) (emphasis added); Ian A. Kass, Note, *Regulating Bomb Recipes on the Internet: Does First Amendment Law Permit the Government to React to the Most Egregious Harms?*, 5 S. CAL. INTERDISC. L.J. 83, 85 (1996) (arguing the level of protection warranted by the speech depends on factors such as "the potential harm caused by it, and how much value the court places on the speech."); *id.* at 93 (quoting Miller v. California, 413 U.S. 15, 24 (1973)) ("[T]he test for obscenity [is] whether 'the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.'"); Einstein & Semararo, *supra* note 135, at 227 ("The level of First Amendment protection accorded to speech . . . may also vary based on the type of speech as well as the type of harm inflicted by the speech.").

[161] *See* Radwan, *supra* note 158, at 48 ("One of the risks that society takes in allowing free speech is the risk that some speech that causes harm will enter into the marketplace . . . When such speech is at issue, a determination must be made regarding whether its value is worth the danger that it presents to society.") (footnote omitted); Kass, *supra* note 160, at 94 (citing *Chaplinsky*, 315 U.S. at 572).

Man—its value and its potential harm.[162] In determining that a reasonable jury could find that Paladin specifically intended to assist murderers such as Perry, the court strongly relied upon their judgment that "*Hit Man*'s only genuine use is the unlawful one of facilitating such murders."[163] The court proceeded to say that "[i]f there is a publication that could be found to have no other use than to facilitate unlawful conduct, then this would be it, so devoid is the book of any political, social, entertainment or other legitimate discourse."[164] Thus, the perceived absence of *any* social value from *Hit Man* is an important factor in finding the requisite intent[165] to support civil liability for aiding and abetting.

b. *Societal Harm*

Another important factor in determining the possible scope of Paladin's liability is the potential societal harm "created" by *Hit Man*.[166] The court's emphasis on societal harm manifests itself in its assessment of the magnitude of the governmental interest,[167] thus, the greater the harm, the stronger the interest. The government has a legitimate interest in preventing statutory violations, and with murder, because of the grave harm, that interest is "incontrovertibly compelling."[168] It follows that aiding and abetting a murder would create a societal harm significant enough to give rise to a compelling governmental interest in proscribing such "action."[169] Thus, culpability in aiding and abetting cases is premised upon the defendant's "successful efforts to assist others in accomplishing the crime," and not advocacy of criminal conduct.[170] Therefore, the Fourth Circuit's decision to allow Paladin to be held civilly liable for aiding and abetting is premised on the compelling governmental interest in punishing and preventing social harm of the highest magnitude.

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[162] *See Rice*, 128 F.3d at 267. ("[*Hit Man* lacks] from its text . . . the kind of ideas for the protection of which the First Amendment exists, and . . . [it] . . . lack[s] . . . even [an] arguably legitimate purpose beyond the promotion and teaching of murder . . . .").

[163] *Id.* at 255.

[164] *Id.*

[165] *See infra* notes 195–96 and accompanying text.

[166] *See Rice*, 128 F.3d. at 244 (finding *Hit Man* to be a "textbook example" of teaching methods of terror and, thus, beyond the protections of the First Amendment).

[167] *See id.* at 243 (finding that speech which is tantamount to criminal conduct can be legitimately proscribed, in essence, because the state has an interest in preventing that particular harm).

[168] *Id.* at 247.

[169] *See* Radwan, *supra* note 158, at 72 ("There is no doubt that the state has a strong interest in preventing speech which will cause a crime, particularly the crime of murder.").

[170] *See Rice*, 128 F.3d. at 246.

c. *A New Category*

Within the framework of its aiding and abetting analysis, the Fourth Circuit concluded that *Hit Man* created a harm of such a magnitude as to create an "incontrovertibly compelling interest" in its prevention.[171] The court proceeded to establish that *Hit Man* contained speech utterly without redeeming value in order to infer the requisite intent possessed by Paladin.[172] Under the guise of aiding and abetting, the Fourth Circuit, in effect determined that *Hit Man* was valueless speech, created a significant harm, and was thus not entitled to any protection from the First Amendment. It appears that while the Fourth Circuit's proffered reason for denying First Amendment protection to *Hit Man* rests upon weak factual and legal ground, the underlying rationale based on the value and harm of *Hit Man* stands on a much firmer factual basis. The court's stronger, although unacknowledged, rationale relies upon similar attributes used by the Supreme Court in creating classes of unprotected speech—valuelessness and significant harm. This suggests that the Fourth Circuit did create a new class of unprotected speech.[173]

B. *The "Bad Tendency Test": One Step Away*

As it was shown in Part III.A, the Fourth Circuit appears to be creating a new class of unprotected speech. Instructional speech[174] that prepares, steels, and is devoid of advocacy, may receive less protection from the First Amendment than other types of speech. The next question to be answered is by what evidence or "test" the Fourth Circuit evaluated the speech contained within *Hit Man*. This Comment argues that the court was applying the age-old "bad tendency" test most clearly articulated in *Debs v. United States*.[175] As previously discussed, *Schenck*

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[171] *Id.* at 247.

[172] *See id.* at 255 ("If there is a publication that can be found to have no other use than to facilitate unlawful conduct, then this would be it, so devoid is the book of political, social, entertainment, or other legitimate discourse.").

[173] The Fourth Circuit is not alone in thinking a new category of speech should be created for instruction manuals of this type. *See* Kass, *supra* note 160, at 93 ("Perhaps the Court should create a new exception for valueless speech that causes societal harm."); Zer-Ilan, *supra* note 158, at 2700–01 (arguing that "technical, detailed, step-by-step, do-it-yourself manuals should be unprotected speech because of the likely severe harm to third parties and minimal social value of such speech").

[174] Instructional speech, for the purposes of this Comment, refers to the dissemination of factual information in a step-by-step, "how-to" format. *See* Zer-Ilan, *supra* note 158, at 2700–01. The author understands that defining instructional speech can become very problematic. *See infra* note 225. However, this aspect of the Fourth Circuit's decision is beyond the scope of this Comment. Therefore, for the purposes of analysis, this Comment will rely on the rather simplistic definition given above.

[175] 249 U.S. 211 (1919); *see supra* notes 18–38 and accompanying text; Rabban, *supra*

and *Debs* stand for the principle, as articulated by Holmes, that a speaker's intent could be inferred from the natural tendency and probable consequences of that speech,[176] as well as "suggesting that the encouragement need not be direct."[177]

The Fourth Circuit does not purport to use the "bad tendency" test anywhere in its opinion. Nonetheless, at the core of their analysis, one cannot help but find *Debs* lurking under the cover of the speech-act doctrine.[178] The Court in *Debs* (1) inferred intent from the *tendency* of Debs's words, and (2) determined the criminality of his act through the tendency of his words to do harm.[179] Comparatively, the Fourth Circuit inferred that Paladin, stipulations aside, had the requisite civil intent based on the tendency of *Hit Man*'s words.[180] The court also required that, within the context of aiding and abetting, there be an overt criminal act.[181] The court further inferred from the tendency of the speech contained within *Hit Man* that Paladin assisted and encouraged Perry in the perpetration of his criminal conduct.[182] Thus, there are differences between the *Hit Man* case and *Debs*, but this Comment will show these differences to be insignificant. This Comment will argue that the Fourth Circuit inferred intent from *Hit Man*'s words, and that the court would not, in a different context, require an overt act to impose liability. Finally, this Comment will show that the Fourth Circuit implicitly thought the tendency of *Hit Man*'s words was sufficient to infer criminal intent.

1. *Inferring Intent from* Hit Man*'s Words*

The Fourth Circuit held that summary judgment was inappropriate because a trier of fact could conclude that Paladin acted with the requisite intent to support civil liability.[183] The court found that this decision could rest collectively, and possibly individually on four bases.[184] This Comment will discuss and examine

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note 5, at 1276 ("In *Schenck* [and] *Debs* [Holmes] judged the intent requirement of the Espionage Act by the tendency of the words rather than through an attempt to uncover the defendants' actual states of mind.").

[176] *See supra* notes 18–38 and accompanying text; *see also* Rabban, *supra* note 5, at 1264 ("Holmes stated that evaluating the tendency of language as evidence of the speaker's intent is a principle 'too well established too manifestly good sense to need the citation of books.'") (quoting *Debs*, 249 U.S. at 216).

[177] Rabban, *supra* note 5, at 1264.

[178] The conduct in this case being civil aiding and abetting.

[179] *See supra* notes 35–38 and accompanying text.

[180] *See id.*; *see also supra* notes 125–29 and accompanying text. The court, in coming to this conclusion, put significant weight on the utter lack of value found within *Hit Man*'s pages.

[181] *See id.*; *see also supra* discussion Part III.A. The court required this aspect for the purposes of their "harm" analysis.

[182] *See Rice*, 128 F.3d at 252.

[183] *See id.* at 253.

[184] *See id.*; *see also supra* note 129.

each of these bases in turn to show that the Fourth Circuit was using the *tendency* of *Hit Man*'s speech to infer Paladin's intent.

The first pillar, which would support a jury conclusion that *Hit Man* possessed the requisite intent, is *Hit Man*'s declared purpose as "an instruction book on murder."[185] The court stated that the a jury could conclude from such "prominent and unequivocal statements of criminal purpose that the publisher who disseminated the book intended to assist in the achievement of that purpose."[186] This, however, allows a jury to infer intent from the tendency of the words. Paladin may want to teach murder for a variety of reasons, and indeed both parties have stipulated that there are audiences to whom *Hit Man* serves a legitimate purpose.[187] Because there is not an undeniable intent, a jury, in determining that Paladin intended to assist in murder, would have to find intent from the natural tendency of *Hit Man*'s words.

Second, the court cited *Hit Man*'s "extensive, decided, and pointed promotion of murder" as "highly probative of the publisher's intent . . . ."[188] The court found that *Hit Man* "so overtly promotes murder . . . [by] boldly proselytizing and glamorizing the crime," that a reasonable jury could infer that Paladin possessed the requisite intent.[189] Promotion of an act cannot be sufficient to find intent for the overt act, unless one concludes that the tendency of the words promoting the act are dispositive of intent to perpetrate the subsequent overt act.[190] Eugene V. Debs promoted his anti-war message during a speech to supporters, and was found to possess the necessary criminal intent for conspiracy to obstruct the draft based on the tendency of his words.[191] Although Debs's words were "less concrete" than *Hit Man*'s, the underlying principle remains—to get from promotion to intent, the court needs to evaluate the tendency of the speech.

Third, the court concluded that Paladin's marketing strategy and target audience—criminals and would-be criminals—could support a finding of the

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[185] *See Rice*, 128 F.3d at 256.

[186] *Id.* at 253.

[187] *See supra* note 84.

[188] *Rice*, 128 F.3d at 253.

[189] *See id.*

[190] For example, if one strongly promotes a keg party, it is not necessarily true that she intends to breach the peace. However, such intent could be inferred from the tendency of such parties to be loud and disruptive to neighbors. Paladin's case is a bit different in that they figuratively promoted the keg party and the keg party happened. However, promotion of an act does not necessarily mean the speaker desires the event to occur. One may promote the making of nuclear weapons for the purpose of showing how easily available such information is. *See infra* note 231. One may similarly promote murder for the purpose of alerting law enforcement personnel to certain techniques used by contract killers.

[191] *See* Debs v. United States, 249 U.S. 211, 214–16 (1919).

requisite intent.[192] But, such a conclusion about Paladin's target audience would need to be based on "*Hit Man*'s seemingly exclusive purpose to assist murderers in the commission of murder . . . ."[193] Again, one would necessarily have to infer from the words of *Hit Man* an *exclusive* purpose, particularly in the light of the parties' stipulations that Paladin had several legitimate target audiences.[194] Because the derivation of intent from the marketing strategy is based on a purpose found from the tendency of the words, the court is again applying the "bad tendency" test.

The final prop, and the perhaps the most distressing, upon which a determination of Paladin's intent may properly rest is that "*Hit Man*'s only genuine use is the unlawful one of facilitating murders."[195] The court determined that a jury would be reasonable in rejecting any of Paladin's "hypothesized lawful purposes" because *Hit Man* is devoid of legitimate discourse, and thus its only genuine use is illegitimate.[196] Such an absence of lawful uses can only be inferred from the tendency of *Hit Man*'s words. Paladin can put forth several legitimate purposes, but the jury can ultimately determine that the tendency of the speech indicates only an illegitimate use, and thus, infer possession of the requisite intent by Paladin.

2. *The Overt Act*

In the case at issue, the Fourth Circuit required occurrence of the actual criminal act which *Hit Man*'s words "tended" to produce. Conversely, the "bad tendency" test punishes words with a tendency to produce a certain result, but does not require that the actual overt act occur.[197] However, the overt act is important in this case only because the civil claim is for aiding and abetting a murder, and thus the criminal overt act is a prerequisite to imposition of liability. In a criminal prosecution for attempt, conspiracy or solicitation, the overt act becomes the publication and dissemination of the instructional manual.[198] Therefore, if Paladin were charged criminally, then the occurrence of an actual murder would be inconsequential to prosecution, at least for criminal conspiracy or attempt.[199] Further, the language used by the Fourth Circuit does suggest that

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192 *See Rice*, 128 F.3d at 254.

193 *Id.*

194 *See supra* note 84.

195 *Rice*, 128 F.3d at 255.

196 *See* discussion, *supra* Part III.A.

197 *See, e.g.*, Schenck v. United States, 249 U.S. 47, 49 (1919) (finding that successful completion of an act should not be the test where the tendency of the speech indicates an intent to bring about that act).

198 *See infra* note 205.

199 *See, e.g.*, *Schenck*, 249 U.S. at 52 (noting that Schenck was charged with conspiring to obstruct the draft with the overt act being the publication and distribution of the pamphlet);

Paladin possessed the requisite criminal intent,[200] and could thus be subject to criminal charges. Therefore, while the court is implicitly using the bad tendency test in a civil case, this may set the stage for explicit implementation of the bad tendency test in a criminal case.

3. *Paladin's Intent: Sufficient for Criminal Prosecution?*

In *Schenck*, *Debs*, and other cases from that era, the "bad tendency" test was used to infer intent in a criminal setting. The current case arises out of a civil wrongful death action. As previously discussed, however, the court nonetheless applied the "bad tendency" test.[201] The important question to resolve in this context is whether the intent inferred from the tendency of *Hit Man*'s words is sufficient to support criminal liability because such liability allows for the prosecution of words alone. It is the position of this Comment that the Fourth Circuit believed Paladin to possess the requisite intent for criminal prosecution.

The Model Penal Code[202] imposes criminal liability for criminal solicitation[203] if "a person . . . with the purpose[204] of promoting [the commission of a crime] . . . encourages . . . another person to engage in specific conduct that

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Debs v. United States, 249 U.S. 211, 211 (1919) (noting that Debs was charged with attempt to obstruct the recruiting and enlisting service of the United States, with the overt act being his speech).

200 *See* discussion *infra* notes 201–13 and accompanying text.

201 *See supra* Part III.B.

202 Promulgated the by American Law Institute in 1962, with its sole purpose being the control of harmful conduct through clear concept and expression. *See* C. McClain, *Criminal Law Reform: Historical Development in the United States*, *in* 2 ENCYCLOPEDIA OF CRIME AND JUSTICE, 510–12 (1983).

203 There are three other ways to punish the dissemination of bombmaking information criminally: conspiracy, aiding and abetting, and teaching or demonstrating bombmaking techniques. *See* DOJ REPORT, *supra* note 112, at 14. As there was no agreement between Paladin and James Perry, a conspiracy charge is not a real possibility. *See id.* at 15. Further, under aiding and abetting law, it would be impossible to punish the speech alone, without an overt act such as Perry's in this instance. *See id.* at 20. Moreover, there is no federal statute dealing with attempt to aid and abet a federal offense. *See id.* Finally, the DOJ Report concludes that the only Federal statute dealing with teaching or demonstrating a "technique capable of death" could be tenuously applied, at best, to the speech involved in *Hit Man*. *See id.* at 22–23 (citing 18 U.S.C. § 231(a)(1)). The DOJ Report concluded that criminal solicitation would be a difficult crime with which to prosecute instructional speech because Federal law requires the solicitor to endeavor to persuade, and proof of circumstances strongly corroborative of the solicitor's intent. *See id.* at 16. However, the Fourth Circuit's conclusions would still likely support imposition of liability upon Paladin for criminal solicitation. *See infra* notes 206–13 and accompanying text.

204 "A person acts purposely . . . if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result." MODEL PENAL CODE § 2.02(2)(a)(i).

would constitute such crime or an attempt to commit such crime . . . ."[205] The Fourth Circuit found a jury could reasonably conclude that Paladin encouraged Perry in his specific "murderous acts."[206] Further, the court concluded that the purpose to facilitate murder could be inferred from the tendency of *Hit Man*'s speech.[207] Thus, all elements of criminal solicitation are present in this case, if the court's understanding of "purpose" in this factual context is the same as it is in criminal trials.

The Fourth Circuit did not formally rule on the question of criminal intent, but from its discussion of criminal intent in the context of criminal aiding and abetting, it is clear that they considered Paladin to possess the requisite intent to support criminal liability. Relying on Judge Learned Hand, the court understood the difference[208] between civil and criminal intent in aiding and abetting law to be that the "civil tort requires only that the criminal conduct be the 'natural consequence of [one's] original act,' whereas criminal intent . . . requires that the defendant have a 'purposive attitude' towards the commission of the crime."[209] The court then concluded "that plaintiffs *have more than met their burden* in establishing . . . [a genuine issue of] fact as to Paladin's intent," even assuming a heightened intent requirement imposed by the First Amendment.[210] This language suggests that Paladin's intent was sufficient to support criminal liability because it met a heightened intent. The court, in citing to several *criminal*

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[205] MODEL PENAL CODE § 5.02. Under Federal law, criminal solicitation is defined as follows:

> Whoever, with the intent that another person engage in conduct constituting a felony that has an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct, shall be imprisoned . . . .

18 U.S.C. § 373(a). The Federal requirement of "endeavors to persuade" may be analogous to the Model Penal Code's requirements of "promotion" and encouragement. If this is the case, then Paladin would be criminally liable under Federal law for criminal solicitation. *See infra* note 206 and accompanying text.

[206] *See* Rice v. Paladin Enterprises, Inc., 128 F.3d 233, 252 (4th Cir. 1997)("[T]hrough powerful prose in the second person and imperative voice, [*Hit Man*] encourages its readers in their specific acts of murder."). The court also observed that "[t]he book is so effectively written that the protagonist seems actually to be present at the planning, commission, and cover-up of the murders the book inspires." *Id.*

[207] *See id.* at 253; *see also* discussion *supra* Part III.B.

[208] The court recognizes that the only possible difference between criminal and civil aiding and abetting is the intent requirement. *See id.* at 251.

[209] *Id.* at 251 (quoting United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938)); *see also* Nye & Nissen v. United States, 336 U.S. 613, 619 (1949) (adopting Judge Hand's view).

[210] *Rice*, 128 F.3d at 251–52 (emphasis added).

cases,[211] stated that heightened intent requires a speaker to act "with the purpose of assisting."[212] Further, in establishing that Paladin could be subject to civil liability, the court assumed that any speech which the "government may criminally prosecute with . . . no concern for the First Amendment, the government may likewise . . . make subject to private causes of action."[213] Thus, in analyzing the court's attempt to distinguish criminal and civil intent, it is reasonable to conclude that Paladin was acting with sufficient intent to support criminal liability in the Fourth Circuit.

Therefore, it becomes clear that the Fourth Circuit implicitly created a new category of speech including, at a minimum, instructional manuals that teach criminal conduct. Further, such speech will receive no protection from civil or criminal liability if its tendency is to create illegal conduct—irrespective of the speaker's specific intent. This understanding of First Amendment law affords little First Amendment protection to "dangerous" persons or groups.

V. THE FUTURE OF INSTRUCTIONAL SPEECH

A. *Within the Context of a "National Emergency"*

First Amendment protections have been limited in times of perceived national emergency through repressive legislation, which have generally been upheld by the Court during specific times of panic.[214] Landmark cases of this era of "less protection" include *Schenck*, *Debs*, and *Dennis*.[215] With the collapse of the Soviet Union, the end to the Cold War, and correspondingly, the Red Scare, leaders and citizens began to perceive a new threat to the nation's security—terrorism.[216] Specifically, tragedies at Ruby Ridge[217] and the Branch Davidian

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[211] *See id.* at 248 (citing United States v. Mendelsohn, 896 F.2d 1183 (9th Cir. 1990); United States v. Kelley, 769 F.2d 215 (4th Cir. 1985); Barnett v. United States 667 F.2d 835 (9th Cir. 1982)).

[212] *Id.* at 248.

[213] *Rice*, 128 F.3d at 247.

[214] *See* Laurent B. Frantz, *The First Amendment in Balance*, 71 YALE L.J. 1424, 1442–43 (1962) (arguing that no matter how much First Amendment protections have been retracted, we must always be prepared to see them reduced further "if the needs of 'security' increase—or if an atmosphere of fear and hysteria makes them seem to increase"); Robert Plotkin, *First Amendment Challenges to the Membership and Advocacy Provisions of the Antiterrorism and Effective Death Penalty Act of 1996*, 10 GEO. IMMIGR. L.J. 623, 632 (1996) ("Strong protection of seditious activity is . . . a relatively recent phenomenon."). *See also* discussion *supra* notes 18–46 and accompanying text.

[215] *See supra* notes 18–46 and accompanying text.

[216] *See* Plotkin, *supra* note 214.

[217] A shootout in Naples, Idaho between militiaman Randy Weaver and FBI agents resulting in the deaths of a federal agent, and Weaver's wife and son. *See* Michael L. Rowady, Comment, *Wolverine Fear: An Inside Look at the Citizen Militia Movement in Michigan*, 74 U.

compound in Waco[218] thrust militia groups into the public consciousness. Subsequently, bombings of the Murrah Federal Building in Oklahoma City and Olympic Park in Atlanta created the current perception among citizens and public officials that militia groups pose a serious threat to the domestic security.[219]

In response to this recent domestic terrorism, Congress may enact a law prohibiting the dissemination of bombmaking instructions.[220] Under the Fourth Circuit's tacit approach, if a "Bombmaking Instructional Manual" existed, such a publication could be subject to criminal prosecution for solicitation because the tendency of its words is to produce bombs. The likely targets of such a law would generally be militia groups and their speech advocating violent action against an overly vast and powerful government they feel has lost touch with the people.[221] It is within this context that this Comment will identify and evaluate possible

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DET. MERCY L. REV. 771, 787–89 (1997).

[218] The FBI and Branch Davidians engaged in a fifty-one day stand-off before the FBI commenced action, prompting the Davidians to set their compound on fire, resulting in the deaths of seventy-five Davidians. *See id.* at 789–90.

[219] *See id.* at 801–07 ("[T]he prevailing view among many Americans is that militia groups are extreme, deranged and threatening [because] . . . [m]any believe the Oklahoma City bombing, the most horrifying and largest mass murder in American History, emerged directly out of the . . . [militia] movement in America."); *id.* at 801 ("If not for Oklahoma City, the . . . [militia] movement would have been dismissed by most Americans as just another harmless political outcry.").

[220] In fact, Congress required the Attorney General to conduct a study determining the constitutionality of restricting the dissemination of bombmaking instructional materials. *See* The Antiterrorism and Effective Death Penalty Act of 1996, 18 U.S.C. § 844, 110 Stat. 1214, 1297 [hereinafter AEDPA]. The results of the Attorney General's efforts are found in the DOJ Report, *supra* note 112. Acting on the advice of the DOJ Report, Congress has moved to prohibit the dissemination of bombmaking instructions, with the Senate passing the Feinstein Amendment by a count of 94-0, which would amend 18 U.S.C. § 842(l)(2), to read as follows:

> It shall be unlawful for any person:
> (A) to teach or demonstrate the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to distribute by any means information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction, with the intention that the teaching, demonstration, or information be used for, or in furtherance of, an activity that constitutes a Federal criminal offense or a State or local criminal offense affecting interstate commerce.

S. 936, 105th Cong. (1997).

[221] *See* Reger, *supra* note 18, at 287 ("In 1995 . . . Montana militia members recruited all good 'patriots' to protect the people of Ravalli County from a 'tyrannical' government . . . ."); *id.* at 296 ("[A] growing number of Americans feel their constitutional liberties are threatened by a vast federal government, [and] some of these individuals seek to challenge this [perceived] abuse of government power by turning to militia groups."); Rowady, *supra* note 217, at 801 ("In effect, nothing short of massive and revolutionary change will satisfy the masses of [militia] . . . .").

ramifications of the Fourth Circuit's decision.

B. *Implications of the Fourth Circuit's Decision*

The "bad tendency" test protects less speech than its contemporary counterpart found in *Brandenburg*.[222] Whereas *Brandenburg* allows speech unless it is likely to incite imminent lawless action, the "bad tendency" test protects speech unless it has a natural tendency to cause lawless action. By not demanding a temporal connection between speech and possible conduct, the "bad tendency" test does not protect as much speech as *Brandenburg*. The facts of *Paladin v. Rice* illustrate this principle, as the publication of *Hit Man* occurred ten years before the action it "tended" to cause. It is exactly the type of speech found in *Hit Man* which gives rise to the most serious concerns about the Fourth Circuit's "new" approach to the First Amendment.[223]

These serious concerns arise when Congress enacts laws aimed at suppressing militia speech in response to domestic concerns.[224] Specifically, if the Fourth Circuit is willing to extend criminal liability to bombmaking instructions that parallel *Hit Man*, then the *scope* of the class of unprotected speech becomes important.[225] If the class is confined to a set of facts similar to *Hit Man*—pure instructional speech—then the ramifications of the Fourth Circuit's approach will be minimized in terms of a loss of protected speech. However, if this new class of speech is defined broadly, the Fourth Circuit will likely suppress significant amounts of formerly protected speech. The Fourth Circuit may attempt to limit suppression of political speech by considering the value of the speech.[226] However, this methodology will necessarily involve *ad*

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[222] *See* Kalven, *supra* note 33, at 236 n.6, 238 (arguing "*Debs* . . . makes little sense and impeache[d] claims to serious freedom of speech" and that the law "may have finally worked itself pure with *Brandenburg*.").

[223] *See* Smith, *supra* note 14, at 349 (observing that historically, in tense or troubled times the government may be more willing to classify speech as "radically subversive" and thus unprotected, and that courts have tended to uphold these restrictions on speech, often over "dissents containing eloquent and passionate free speech rhetoric").

[224] *See, e.g.*, the Feinstein Amendment, *supra* note 220.

[225] *But see* Sandra Davidson, *Blood Money: When Media Expose Others to Risk of Bodily Harm*, 19 HASTINGS COMM. & ENT. L.J. 225, 243 (arguing the real difficulty lies in *defining* "how to" books, because "any well-written, easy to understand work of fiction that explains the activities that are occurring could be used as a manual . . . . The clearer the expression, the easier the book (or television show or movie) would be to follow as a model").

[226] The "bad tendency" test looks only at the harm certain speech may create. *See supra* note 37. By looking at the value of the speech and weighing it against the tendency of the speech to do harm, the Fourth Circuit could conceivably protect political speech. Numerically speaking, by looking solely at harm, a court is in effect saying that the speech's value has no weight, or a value of zero. Thus, for any speech, if the harm was determined by a court to be one or greater, then that speech would not be protected: $1 > 0$. However, if value is added to the

hoc balancing, which is no better than other alternatives. The possible scope of the Fourth Circuit's approach is discussed below.

1. *Confined to the Facts of the Present Case*

The Fourth Circuit's unwillingness to offer First Amendment protections to certain types of instructional speech may not extend beyond the facts of this case. If this were so, the Fourth Circuit would only apply its implicit "bad tendency" test to pure instructional speech.[227] This approach would certainly limit the amount of speech subject to various types of liability as compared to the alternatives.[228] However, this approach could still result in the regulation of speech considered to be at the core of First Amendment protections—dissident political speech.[229]

Even if the court embraces a narrow understanding of its "new" category of unprotected speech, suppression of political philosophy can still occur. It simply cannot be assumed that instructional speech is void of political content.[230] It is quite possible instructions themselves constitute political advocacy, even bombmaking instructions.[231] If the ideology of a certain militia, or especially

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equation, then speech with a harm of one may not be protected if its value is greater than one: 1 < 2. Therefore, consideration of the speech's value may lead to protection for speech which would have otherwise been proscribed.

227 *See supra* note 174. Within this Comment's definition of instructional speech, *Hit Man* is probably best described as pure instructional speech, and for the sake of this argument, the author will assume as much.

228 *See infra* notes 238–41 and accompanying text.

229 *See* Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Whitney v. California, 274 U.S. 357, 374 (1926) (Brandeis & Holmes, JJ., concurring) ("[A] State is, ordinarily, denied the power to prohibit dissemination of social, economic, and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence."); Van Alstyne, *supra* note 7, at 139 (observing that political speech is "deemed of such central importance to the functions of the First Amendment" that only the highest probability of a reprehensible evil will justify any suppression).

230 *Cf.* Bigelow v. Virginia, 421 U.S. 809, 818 (1975) ("[S]peech is not stripped of First Amendment protection merely because it appears in [a commercial] form."). The Court went on to conclude that an advertisement for abortion services pertained to the constitutional interests of the general public, which coincided with the speaker's First Amendment interests. *See id.* at 822.

231 *See* Erwin Knoll, *The H-Bomb and the First Amendment*, 3 WM. & MARY BILL RTS. J. 705 (1994) (observing that an article disclosing instructions on how to make an H-bomb was published in *The Progressive*, a magazine "adamantly opposed to war and militarism," in an effort to dispel certain myths associated with the bomb). The author, Howard Morland, sought to dispel the "H-bomb secret" myth by showing it was not a secret at all. *See id.* Morland also sought to show that the "secret" could not be "written down on the back of an envelope [ ] or in

anarchists, is tied to rising up against the government or creating disorder, then specific bombmaking instructions may themselves express a political statement.[232] Expressing political beliefs may not motivate the dissemination of most instructional speech, but in some rare instances, such dissemination can function as a mode for expressing political viewpoints.

Unfortunately, the Fourth Circuit is utterly unequipped to distinguish among the various types of instructional speech. As a result, it erroneously relies on the tendency of instructional speech to do harm. This test punishes instructional speech, whether it solely communicates methods of murder or whether it passionately expresses political dissent. The Supreme Court has recognized only one narrow type of speech which elicits a harm great enough to obviate the content of the speech—child pornography.[233] The Court noted that the speech need not be obscene, it merely had to depict a child in a certain fashion, thus *harming* the child each and every time this material was produced.[234] The Fourth Circuit, however, is far from concluding that a definable harm will occur each time the instructional speech found in *Hit Man* is produced, the Fourth Circuit only looked at the *tendency* of such words to produce harm. By employing the "bad tendency" test, the Fourth Circuit simply ignored whether or not regulation of instructional speech implicated core First Amendment values. This approach is simply inconsonant with First Amendment jurisprudence.

2. *Beyond the Facts of the Present Case*

Unfortunately, the Fourth Circuit's approach towards instructional speech probably extends beyond the facts of the present case. The Fourth Circuit, through its implicit application of the "bad tendency" test, has determined that the

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a magazine article[ ]," but rather that building an H-bomb was a monstrous task capable of being undertaken only by large governments. *Id.* at 706. Mr. Knoll was the editor of *The Progressive* at the time Mr. Morland sought to publish his article.

Along the same lines, one could publish an instructional manual describing methods of civil disobedience, which may describe certain types of illegal conduct. This type of manual could be for the sole purpose of expressing dissatisfaction with the government. Further, *Hit Man* could conceivably constitute an extreme statement on anything from vigilantism to overpopulation.

[232] *See* Kass, *supra* note 160, at 93 (arguing that if the writer explained her views of society and the rationale behind the dissemination of bombmaking recipes then such speech would have political value); *supra* note 231.

[233] *See* New York v. Ferber, 458 U.S. 747 (1982) (holding child pornography unprotected under the First Amendment). The Court came to this conclusion because in every instance in which this speech was made, a child was harmed. *See id.* at 759. There is no such finding in this case, and any speculation as to this point is without foundation.

[234] *See Ferber*, 458 U.S. at 764 ("[T]he nature of the harm to be combated requires the state offense be limited to works that *visually* depict sexual conduct by children below a specified age.") (emphasis added).

touchstone for First Amendment protection is the ultimate harm that the speech may bring about. Thus, the Fourth Circuit would deny protection to instructional speech irrespective of context, if the words had a tendency to produce harm. The court articulated this principle in concluding that the First Amendment is generally inapplicable to aiding and abetting laws,[235] in which the court strongly relied upon *Freeman v. United States*.[236] Importantly, the *Freeman* court noted that speech which contained both instruction and advocacy could still be prosecuted for aiding and abetting.[237] This reliance is consistent with the importance the Fourth Circuit places on the tendency of words to cause harm, and leads to the conclusion that the presence of unprotected instructional speech "trumps" traditional First Amendment jurisprudence.

This emphasis by the Fourth Circuit on the harm instructional speech may create gives rise to serious First Amendment concerns.[238] A manifesto urging opposition to the government for a variety of political reasons, that happens to include a recipe for a fertilizer bomb,[239] may be criminally prosecuted based on the tendency of the words to create harm. Further, a manifesto with similar overtones, that contains a reference to bombmaking instructions,[240] may also be

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[235] *See* Rice v. Paladin Enterprises, Inc., 128 F.3d 233, 245 (4th Cir. 1997).

[236] 761 F.2d 549 (9th Cir. 1985).

[237] *See Rice*, 128 F.3d at 245 (citing *Freeman*, 761 F.2d at 552).

[238] *See supra* note 226.

[239] For example, to make a pipe bomb all one needs to do is:

1. Drill a 1.5 cm hole through the pipe cap.
2. Drill a 3–5 mm hole through the pipe.
3. Glue a membrane, that can be dissolved with acid, in place over top of the hole in the pipe. The thickness of the membrane determines the delay time.
4. Place the cap on the pipe, aligning the two holes.
5. Fill the pipe with 80% potassium permanganate and 20% sugar mixture.
6. Tape the pipe to a board to prevent rolling.
7. Fill the top hole (the hole in the cap separated from the hole in the pipe by the membrane) with sulfuric acid.
8. When the sulfuric acid contacts with the mixture a violent explosion will occur.

See SEYMOUR LECKER, IMPROVISED EXPLOSIVES: HOW TO MAKE YOUR OWN, 36–37 (1985).

[240] For example, one should consult *The Terrorist's Handbook* for an excellent guide to producing bombs from start to finish. *The Terrorist's Handbook* can be found on the Internet at a certain website—i.e., <www.bomb.com>. It is important to note that focusing on the tendency of words to do harm treats a reference to bombmaking instructions the same as actual dissemination of such instructions. Each has the *tendency* to cause the same harm. *The Terrorist's Handbook, e.g.*, provides more detailed and sophisticated bombmaking instructions than those found in LECKER, *supra* note 239. Interestingly, the availability of *The Terrorist's Handbook* on the Internet may have helped motivate passage of the Feinstein Amendment. *See* Adam R. Kegley, Note, *Regulation of the Internet: The Application of Established*

prosecuted. However, within the context of a political manifesto, it is hard to imagine a more definitive, effective expression of one's ideology than through the inclusion of bombmaking instructions.[241] Yet the Fourth Circuit may be willing to proscribe this type of speech, along with all other speech found within the same document—political speech included—because this speech could assist another in the production and use of a bomb. Thus, the Fourth Circuit's approach has the potential, if extended beyond the facts of the present case, to withdrawal First Amendment protections from substantial amounts of speech.

Even assuming that the Fourth Circuit chooses not to focus solely on harm, the implications of an alternative approach are also unsavory. If the Fourth Circuit chooses a different approach, then it likely will opt to engage in balancing, weighing the value of the speech and its societal harm, in determining its categorization.[242] However, this will not result in a principled approach to a

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Constitutional Law to Dangerous Electronic Communication, 85 KY. L.J. 997, 1003 (1996) ("Senator Edward Kennedy waved a 76-page 'Terrorist's Handbook' . . . downloaded from the Internet, . . . explain[ing] that it contained instructions for . . . the ammonium nitrate bomb used in Oklahoma [City.]") (footnote omitted).

[241] *See* Thomas B. Mcaffee, *Constitutional Limits on Regulating Private Militia Groups*, 58 MONT. L. REV. 45, 74 (1997) ("[M]ilitias have engaged in political discourse, ranging from statements of pure political ideology to predictions and advocacy of violent confrontation with the government."). If one was advocating violent confrontation with the government, then the inclusion of bombmaking instructions could indicate the strength of one's political convictions by expressing ultimate commitment to one's ideology in a manner beyond the mere meaning of words. In essence, instructional speech may allow militias to say "not only do we believe the government to be overly vast, but we have the capacity to do something about it, so you should take us seriously." This idea is obviously context dependent, in that one would probably need to indicate that the instructional speech was designed for this purpose. A manifesto advocating violent confrontation with the government would provide sufficient context.

Similarly, the author certainly does not intend for any readers of this Comment to attempt assembly of a pipe bomb, but rather included this information for its emotive function in communicating the notion that this type of speech should not necessarily be proscribed. *See supra* note 239. It seems clear to the author that within the context of this Comment, a reader would be hard-pressed to construe note 239 as anything but advocating protection for instructional speech in some instances. However, under the Fourth Circuit's approach, intent to cause assembly and use of pipe bombs would be imputed to the author based on the tendency of the instructions. *Cf.* Cohen v. California, 403 U.S. 15, 26 (1971) ("[L]inguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well."). The Court in *Cohen* held that although the defendant had a myriad of alternatives, he was still entitled to express his beliefs through use of the words "*fuck* the draft." *Id.* (emphasis added). For an excellent review of *Cohen*, see William Cohen, *A Look Back at* Cohen v. California, 34 UCLA L. REV. 1595 (1987).

[242] *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 967 (1987) (observing that "over the past decade [1977–1987] the Court has resorted to balancing in First Amendment cases with increasing frequency"). It would seem logical for a court to balance the governmental interests—harm—against the interests of the public in receiving such speech—value—to reach a conclusion under the First Amendment. *See* New

determination of what speech is protected by the First Amendment, for balancing bestows standardless discretion upon a court.[243] This discretion comes from a court's assessment of the interests to be balanced, which in essence allows a court to reach whatever conclusion it wishes about the speech through the proper "weighing" of the competing interests.[244] Essentially, the court could, through the balancing of value and harm, protect the speech it subjectively wants to protect and throw to the wolves the speech it deems deserving of such a fate.[245]

Perhaps the ultimate significance of the Fourth Circuit's approach to the First Amendment lies in their willingness to allow the majority to pass judgment on dissident speech.[246] In a criminal proceeding for dissemination of bombmaking information a jury will be asked to examine the content of the speech and

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York v. Ferber, 458 U.S. 747, 763–67 (1982) (holding New York statute criminalizing distribution of child pornography constitutional because "the evil . . . restricted . . . overwhelmingly outweighs the expressive interests, if any, at stake"). Further, the Fourth Circuit does place emphasis on *Hit Man*'s harm and value in reaching its conclusion. *See supra* notes 162–73 and accompanying text.

[243] It is important to note that there are two types of balancing: definitional and ad hoc. Definitional balancing creates a rule based on the value of the competing interests such that no more weighing needs to be done. Ad hoc balancing looks at the weights of the competing interests in each case, much like a common law approach. One may argue that definitional balancing does not lead to the same uncertainty that ad hoc balancing creates and is thus an effective tool with which the judiciary can decide cases. *See* MELVIN NIMMER, NIMMER ON FREEDOM OF SPEECH § 2.03, at 2–17 (1984). However, definitional balancing will essentially break down into ad hoc balancing as soon as the court is willing to consider interests of different degree from their previous decisions. *See* Aleinikoff, *supra* note 242, at 980 (arguing that there is a "artificiality of the distinction between 'definitional' and 'ad hoc' balancing[,] [because] [n]ew situations present new interests, and different weights for old interests," and if the court reopens the balancing process for these interests, every case becomes one of ad hoc balancing).

For example, in one instance, the court may determine the societal harm—occurrences similar to the Oklahoma City bombing—to be so great as to outweigh any value the speech may possess and accordingly afford no protection to the speech. This would be definitional balancing. However, if similar speech with higher value and with relatively low harm, comes before the court, they may be tempted to protect such speech, even though definitional balancing would preclude any further consideration of value and harm. This is ad hoc balancing.

[244] *See* Black, *supra* note 110, at 878 ("The great danger of the judiciary balancing process is that in times of emergency and stress it gives Government the power to do what it thinks necessary to protect itself, regardless of the rights of individuals.").

[245] This becomes truly frightening when one understands that this balancing approach offers no floor beneath which First Amendment freedoms cannot sink. *See* Frantz, *supra* note 214, at 1442 ("No matter how low [the floor] may fall, . . . [it can always] fall still further [in times of national emergency.]").

[246] *See* Rice v. Paladin Enterprises, Inc., 128 F.3d 233, 249 (4th Cir. 1997) ("[W]e are satisfied a jury could readily find that the provided instructions . . . have no . . . noninstructional communicative value . . . .").

determine guilt or innocence. The "bad tendency" test will allow the jury, without the restraints of an imminence requirement, to infer intent from the tendency of the speaker's words—words that they may find reprehensible. The Espionage Act and Smith Act granted the juries such power, and they rarely, if ever, passed up an opportunity to condemn words with which they disagreed, despite the absurdly remote possibility that the words would lead to action.[247] The Fourth Circuit's decision is, unfortunately, the first step backwards to a time when speech was permissible only if the majority permitted it.

C. *A Better Solution*

While the Fourth Circuit was busy revitalizing a First Amendment doctrine that, by today's standards, affords minimal protection to speech, the court was at the same time ignoring existing First Amendment doctrines that can competently siphon unprotected instructional speech from protected instructional speech. The important distinction that can be drawn between unprotected and protected instructional speech is the speech's expressive element.[248] Such a distinction

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[247] *See generally* Debs v. United States, 249 U.S. 211 (1919); Schenck v. United States, 249 U.S. 47 (1919). Perhaps the most egregious conviction occurred in Abrams v. United States, 250 U.S. 616 (1919). Defendants were convicted of conspiring to unlawfully utter, print, write, and publish:

> 1. Disloyal, scurrilous and abusive language about the form of the Government of the United States;
> 2. Language intended to bring the form of the Government of the United States into contempt and disrepute;
> 3. Language intended to incite, provoke, and encourage resistance to the United States in their war with Germany;
> 4. Language intended to urge, incite, and advocate curtailment of production of things necessary to the prosecution of the war, such as ammunition.

See id. at 617. Defendants were five Russians opposed to the United States' military movement into Russia during World War I, which they viewed as an attempt to interfere with the Russian Revolution. *See id.* at 629–31. Defendants accordingly urged the general strike of workers in ammunition factories. *See id.* at 624. The Court upheld their convictions, acknowledging that their *intent* may have been to aid the cause of the Russian Revolution, but that the *tendency* of their speech was to inhibit the United States' prosecution of the war against Germany. *See id.*

[248] The Court has derived several "lines in the sand" between unprotected and protected speech. *See, e.g.*, Hans A. Linde, *'Clear and Present Danger' Reexamined: Dissonance in the* Brandenburg *Concerto*, 22 STAN. L. REV. 1163, 1184–85 (1970) (noting that Justice Black defined expression within the First Amendment concept of speech by drawing a line between constitutionally protected speech and unlawful conduct, while "Justice Douglas has settled on the phrase 'speech brigaded with action.'"); *see also* Cohen v. California, 463 U.S. 15, 26 (1971) (holding emotive as well as cognitive speech protected under the First Amendment).

These distinctions are handy monikers, but one still needs to assess the expressive content of the speech to reach a conclusion. For the purposes of this Comment, non-expressive speech

would subject expressive instructional speech to traditional First Amendment protections—including those found in *Brandenburg*.[249] Nonexpressive instructional speech would be dealt with through application of a test similar to those developed for conduct and commercial speech. This approach preserves the fundamental values underlying the First Amendment.[250]

The practicality of this approach to instructional speech is evident as the Supreme Court has made this distinction in several areas with relative ease. The Court has explicitly recognized a difference between expressive and nonexpressive conduct,[251] and has at least implicitly recognized the difference between expressive and nonexpressive speech.[252] The Court, in making this

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will refer to purely factual communication. Expressive speech, conversely, is everything that is non-expressive. Expressive generally refers to communications of beliefs or opinions, or communication which lends emotive force to one's beliefs or opinions. For example, the comment "Andy Katzenmoyer is the best linebacker in football because of his size, speed, strength, and nose for the ball" would be communicating an idea or opinion, while the comment "Ohio State beat Michigan 50-14" would be communicating purely a fact, not an idea or opinion. Interestingly, the Fourth Circuit also observed a difference between noninstructional and instructional communications. *See Rice*, 128 F.3d at 249.

While absolute distinctions may not necessarily be well-tailored for application to other types of speech, such a distinction is particularly apt for instructional speech. Such speech, as this Comment has defined it, necessarily communicates factual information in the form of step-by-step instructions. Therefore, the proper judicial inquiry should be whether such speech expresses beliefs or lends force to certain beliefs. If a court answers this question affirmatively, then there is a sufficient communicative component to deem such speech expressive. *Cf.* Spence v. Washington, 418 U.S. 405, 410–11 (1974) (finding that conduct provides sufficient communicative elements to bring the First Amendment into play when there is "[a]n intent to convey a particularized message and . . . the likelihood was great that the message would be understood by those who viewed it").

[249] The Court has undertaken a much stricter review of government regulation of expressive speech because it clearly understands that the expression of ideas and opinions are at the core of First Amendment values. *See supra* note 229. Thus, a regulation proscribing expressive speech and conduct will only be upheld if such speech falls into one of the traditional categories of unprotected speech. *See supra* note 7. Moreover, the only category of unprotected speech which is applicable to instructional speech is those words which incite imminent lawless action. Thus, if the Court determines certain instructional speech to be essentially expressive in nature, it should apply the *Brandenburg* test to determine the existence of First Amendment protections.

[250] *See supra* note 229.

[251] *See* United States v. O'Brien, 391 U.S. 367 (1967) (holding that the act of burning a draft card was primarily nonexpressive conduct, and could therefore be more easily punished than expressive conduct or symbolic speech).

[252] Commercial speech can be considered nonexpressive speech. *See* Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 563 (1980) (holding that "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising"); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) ("The free flow of *purely factual* commercial information is indispensable to the market economy."). Political speech can clearly be

distinction, has extended significant First Amendment protections to expressive conduct and speech.[253] Conversely, nonexpressive speech and conduct have been afforded less First Amendment protection by the Court.[254] Thus, it would appear that nonexpressive instructional speech should receive less protection from the First Amendment than expressive instructional speech.

This Comment's approach has two advantages over the "bad tendency" test adopted by the Fourth Circuit. First, this approach allows a court to extend traditional First Amendment protections to instructional speech when such speech is political in nature. Second, this approach involves no definitional or *ad hoc* balancing of the attributes of specific speech. These advantages will now be discussed in turn.

1. *The Capacity to Protect Political Speech*

The approach advocated by this Comment has the flexibility to protect instructional speech of a political nature, whereas the Fourth Circuit's "bad tendency" approach lacks the capacity to make such a distinction.[255] As it has

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considered expressive speech. Advocacy, by its nature, requires the espousal of a particular idea, opinion, or belief.

[253] Generally expressive conduct and speech cannot be proscribed unless they fall into a category of unprotected speech. *See supra* note 7; *see also, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (holding flag-burning to be expressive conduct and thus subject to First Amendment protection); Cohen v. California, 403 U.S. 15 (1971) (finding expression through the use of offensive words subject to First Amendment protections).

[254] *See Central Hudson*, 447 U.S. at 566 (holding that lawful and nonmisleading commercial speech can be proscribed if the regulation directly furthers a substantial governmental interest in a manner no more extensive than necessary to serve that interest); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456–57 (1978) (finding the Constitution to accord lesser protection to commercial speech than to other constitutionally guaranteed expression); *O'Brien*, 391 U.S. at 377 (holding that if the regulation furthers a substantial governmental interest unrelated to the suppression of free expression, which only minimally implicates First Amendment freedoms, then such regulation would be constitutional).

Generally, the rationale behind the Court's willingness to allow regulation of nonexpressive speech and conduct relies on the notion that suppression of such speech will not have a chilling effect on speech. *See Virginia State Bd. of Pharmacy*, 425 U.S. at 772 n.24 ("The truth of commercial speech . . . may be more easily verifiable . . . [and s]ince advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely.") (emphasis added). Further, the Court has carefully crafted the standards which apply to nonexpressive communication to prohibit governmental regulations that implicate First Amendment freedoms in a manner more extensive than necessary. Thus, the Court has understood nonexpressive communication to be further away from core First Amendment values than expressive communication, and has accordingly allowed the government greater latitude in regulating such speech.

[255] If all the court is concerned about is the tendency of the words to do harm, then the value of the speech is irrelevant. *See supra* note 226.

been argued, instructional speech can have political value standing alone,[256] or in the right context.[257] While the Fourth Circuit would merely look at the tendency of such speech to do harm, this Comment's approach would evaluate such speech as *political speech*, accordingly determining if the words are likely to incite imminent lawless action.[258] In practice, this approach would likely protect the speech found in *The Progressive*[259] while allowing for restriction of the speech found in *Hit Man*.[260] This Comment's approach is therefore superior to the Fourth Circuit's jurisprudence because the former approach properly adheres to the core values of the First Amendment—protection of dissident political

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[256] *See supra* note 231.

[257] *See supra* note 241.

[258] This difference does indeed lead to a significant amount of additional protection for instructional speech. The Fourth Circuit will only look at the tendency of the words to decide if, as a matter of law, the speech is protected. If the Fourth Circuit determines no protection is necessary, then a jury will decide whether the speech contains "noninstructional communications." *See* Rice v. Paladin Enterprises, Inc., 128 F.3d 233, 249 (4th Cir. 1997). However, under this Comment's approach, a court must determine as a matter of law (1) whether the speech is expressive or nonexpressive, and (2) whether the speech is protected under the appropriate First Amendment doctrine. Thus, this Comment's approach significantly reduces the opportunity for the majority to pass judgment on speech which it may find appalling.

[259] *See supra* note 231. Such speech was clearly meant to express an opinion, or more appropriately, to add greater force to the author's opinion. Under this Comment's approach, such speech would be evaluated under *Brandenburg*. Since converting H-bomb instructions into an actual H-bomb takes significant amounts of time and capital, it can hardly be said to promote imminent lawlessness. Thus, such speech would be protected.

Similarly, a political manifesto advocating revolt against an overly vast government may be able to demonstrate, through the inclusion of bombmaking instructions, a passion for its tenets unable to be captured through ordinary writing. Again, using this Comment's approach, this speech would be evaluated under *Brandenburg*. Determining whether such speech is protected would probably turn on two factors: (1) the medium (a flyer may only take a few minutes to read as compared to a full manifesto) and (2) type of instructions (a pipe bomb could be assembled in a few days, but more complex bombs may take significantly longer).

[260] The instructional speech found in *Hit Man* may arguably be described as nonexpressive communication. Arguably, the type of communication found in *Hit Man* does not involve the espousal of any ideas or opinions, but is instead concerned solely with imparting information upon the reader for the purposes of committing an act. Further, such instructional speech is being packaged in the form of a book and sold to consumers, thus adding to the "sturdiness" of the speech. Thus, the speech in *Hit Man* should arguably be judged by the same standard the Court has applied to other nonexpressive communications. This standard inquires as to whether the government action furthers a substantial interest in a direct way which only minimally implicates the First Amendment concerns for expressive communication. Under this standard, it is clear that the government has a substantial interest in preventing murder, and restricting murder manuals probably furthers this interest in a manner that only minimally implicates First Amendment values.

speech.[261]

2. *No Definitional or* Ad Hoc *Balancing*

As discussed, the Fourth Circuit may look beyond the harm of specific instructional speech and engage in balancing in an effort to protect political speech. This will bestow tremendous discretion upon a court, and will likely break down into ad hoc balancing.[262] This Comment's approach, however, commits a court to an absolute decision—does this instructional speech contain an expressive element? A court therefore is constrained from evaluating value and harm, at least superficially, and correspondingly, discretion vested in a given judge is decreased.[263] Removing discretion from a court, at least as a matter of degree, is generally advantageous to First Amendment freedoms.

The Fourth Circuit's approach would likely have a significant chilling effect because the extent to which specific instructional speech would receive protection is dependent upon balancing. In order to ascertain the potential protection, a publisher would need to determine how a court would evaluate the specific instructional speech.[264] This would necessarily lead to extensive uncertainty, which in turn creates a chilling effect.[265] This Comment's approach, conversely, provides speakers with an absolute test—is this speech expressive? While this approach still allows for judicial discretion to some degree, it provides speakers greater certainty in evaluating the likelihood of liability attaching to such speech. Reducing the chilling effect associated with a certain type of speech is unquestionably harmonious with First Amendment values.[266]

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[261] *See supra* note 228.

[262] *See supra* notes 242–45 and accompanying text.

[263] This Comment does realize the discretion will still reside within a court if it adopts the advocated approach. Certainly a court could label speech it "values" as expressive, and speech it fears as non-expressive. However, this approach will eventually develop precedent, which should lead to certain defined areas of the law. Once this occurs, a court will be obliged to rule a certain way, thus ultimately removing discretion from the judiciary over time. *See* Frantz, *supra* note 214, at 1435 ("Consequently, in cases falling clearly within the defined areas, the definer [the judge] is largely relieved of responsibility for results in particular instances which he may find personally distasteful.").

[264] *See* Frantz, *supra* note 214, at 1443 ("Whether one ha[s] a right to speak or publish cannot be known until after the event and depends on the unpredictable weight which a court may someday give to 'competing interests.'").

[265] Because a publisher is uncertain of the type of protection certain speech may receive, the publisher may simply decide not to publish, thus avoiding any liability risk. *See* Frantz, *supra* note 214, at 1443 (explaining that "many . . . will be deterred merely by the pervasive and ineradicable uncertainty" from engaging in protected speech).

[266] *See* Reno v. American Civil Liberties Union, 117 S. Ct. 2329, 2344 (1997) ("[V]agueness . . . raises special First Amendment concerns because of its obvious chilling effect on free speech."); Zablocki v. Redhail, 434 U.S. 374, 409 (1978) (Rehnquist, J.,

VI. CONCLUSION

At the outset, this Comment posed the question: Is the First Amendment a parasol or an umbrella? Concededly, the speech found in *Hit Man*, and especially the result, challenge, and almost defy the most staunch First Amendment literalist to argue for its protection. However, in a rush to condemn *Hit Man*, the Fourth Circuit implicitly revived a methodology discordant to core First Amendment values—the "bad tendency" test. The significance of this approach surfaces as one understands the context within which we are living, and what groups pose the greatest perceived threat to domestic security. Within this context, it is likely that the government will enact restrictions on certain types of instructional speech—namely that speech which is most closely related to militias. Armed with the "bad tendency" test, it is doubtful that the Fourth Circuit would do anything but uphold these speech restrictions, even if they directly affected political speech. Thus, it appears that the First Amendment is but a parasol in the Fourth Circuit.

Unfortunately, in their hurry to send *Hit Man* to civil trial, the Fourth Circuit overlooked, or maybe simply chose to ignore, existing First Amendment doctrines that have the capacity to sort protected instructional speech from the unprotected. The judiciary need only to examine the expressive content of the speech, and make a determination as to whether it is expressive or nonexpressive. Expressive speech should be scrutinized under traditional First Amendment doctrines, while nonexpressive speech should be reviewed under the same types of relaxed standards applied to conduct and commercial speech. Within this approach, a court can extend *Brandenburg* protections to politically instructional speech, while treating nonexpressive instructional speech similarly to conduct. This approach should be used by future courts when confronted with a restriction upon instructional speech, for it understands and appreciates that the First Amendment is intended to function not as a parasol, but as an umbrella.

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dissenting) ("[We] allow [for] the invalidation of facially overbroad statutes to guard against a chilling effect on the exercise of constitutionally protected free speech."); Frantz, *supra* note 214, at 1443 ("[T]he Court condemns statutes which, because of their breadth or vagueness, deter protected speech.").